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IN THE
SUPREME COURT OF THE UNITED STATES
Term, 1975

No. 75-1291

CONVALESCENT CARE, INC.,

Petitioner

vs.

CHARLES W. BATES, DIRECTOR, OHIO DEPARTMENT OF PUBLIC WELFARE, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE FRANKLIN COUNTY
COURT OF APPEALS

Richard F. Swope
THOMPSON, SWOPE, BURNS & BISWAS
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Reynoldsburg, Ohio 43068

Counsel for Petitioner

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Counsel for Petitioner

BLEED THROUGH

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AFFIDAVIT CERTIFYING SERVICE

STATE OF OHIO
COUNTY OF FRANKLIN, ss:

I, Richard F. Swope, being first duly cautioned and sworn according to law, depose and say that I have on this ____ day of _____, 1976, mailed a copy of the attached Petition for Writ of Certiorari to the Supreme Court of the State of Ohio, to James W. McCarthy and James Carpenter, Assistant Attorney Generals, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, and to James R. Unger, Assistant Prosecuting Attorney, Stark County Court House, Canton, Ohio 44702.

_____
Richard F. Swope

Sworn to before me and subscribed in my presence this ____ day of _____, 1976.

_____
Notary Public

TABLE OF CONTENTS

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
Constitutional Provisions, Statutes and Regulations Involved	5
Statement of Facts	6
Reasons for Granting this Writ:	17

I. Can the Respondent, Ohio Department of Welfare refuse to renew Petitioner's annual contract (Provider Agreement) to care for state welfare patients for a specified rate from funds supplied the state under Title XIX of the Social Security Act when petitioner has expended funds, labor and time to meet more costly and demanding federal regulations and has previously been certified by the state agency authorized by law to approve such facilities when the state agency decertifies or denies certification without prior notice or hearing on the alleged deficiencies without violating petitioner's right to due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States?

II. Can the Respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract to care for welfare patients (Provider Agreement) when respondent has expended money, time and effort to meet more stringent federal regulations, to care for

Page

skilled nursing patients whose care is partially paid for under Title XIX of the Social Security Act when such agreement has been renewed for several years even though all claimed deficiencies have not been remedied without being afforded a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

III. Does not enforcement of federal standards against petitioner which are substantially more stringent than existing state standards by respondent result in the federal government's invasion of state reserve powers in contravention of the Tenth Amendment to the Constitution of the United States?

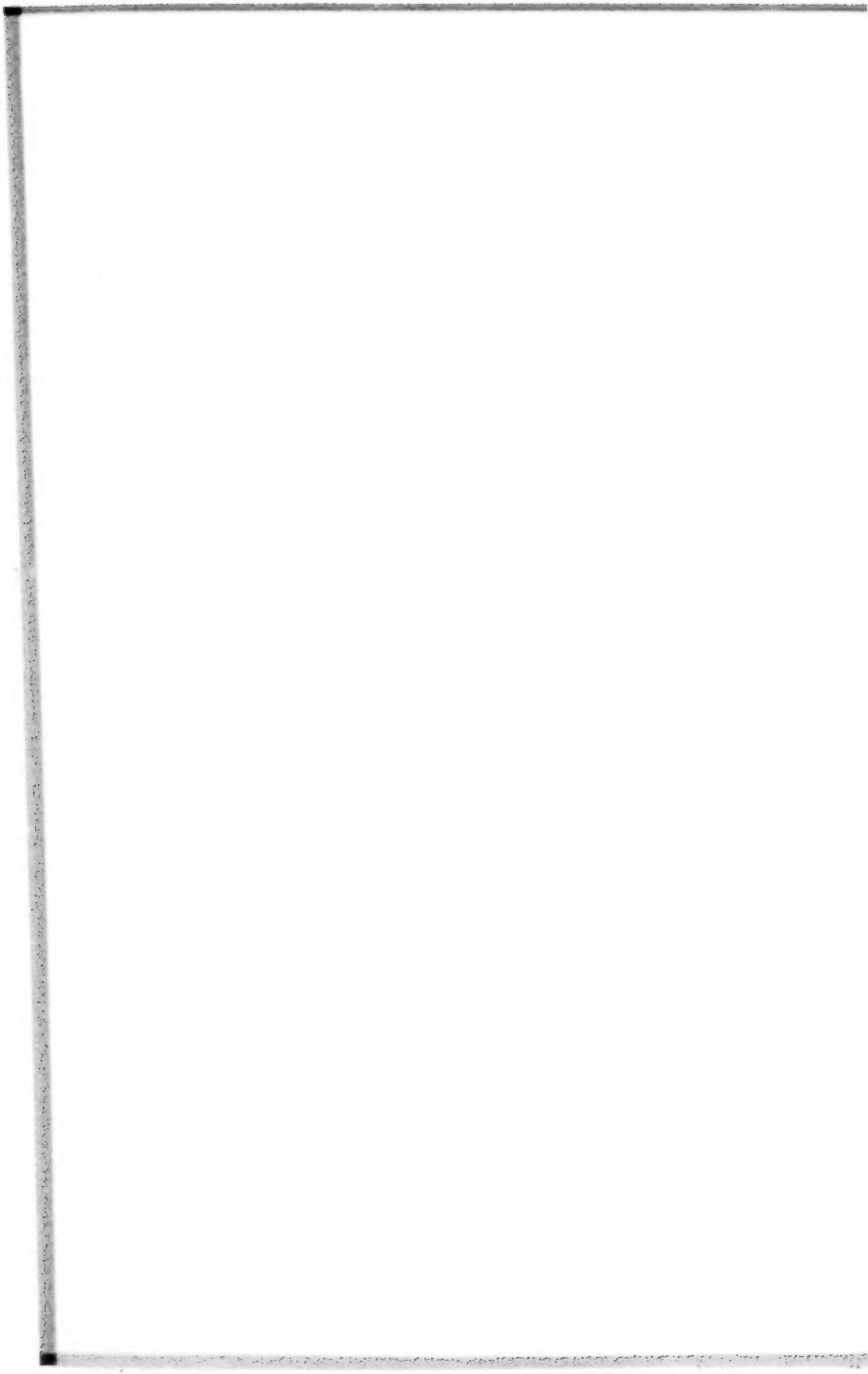
Conclusion 33

Appendix

A. Complaint for Injunction and Declaratory Judgment 37
B. Decision and Journal Entry of the Court of Common Pleas of Franklin County, Ohio, rendered October 21, 1974 42
C. Entry of the Court of Common Pleas of Franklin County, Ohio, filed November 21, 1974 46
D. Decision of the Court of Appeals of Franklin County, Ohio, rendered on May 15, 1975 48
E. Journal Entry of Judgment of the Court of Appeals of Franklin County, Ohio, filed on May 30, 1975 65

Page

F. Decision of the Supreme Court of Ohio, rendered on September 18, 1975. 66
G. United States Constitution, Amendment V 68
H. United States Constitution, Amendment XIV 69
I. United States Constitution, Amendment X 70
J. Section 119.01(A,B), Revised Code 71
K. Section 119.06, Revised Code 72
L. Section 119.07, Revised Code 74
M. Section 119.12, Revised Code 76
N. Section 3721.07, Revised Code, 1975 Supplement, page 43 80
O. Section 5101.51, Revised Code, (1975) 82
P. 45 CFR 249.33, Federal Register, page 171-175 84
Q. Federal Register Volume 39, No. 12, Subpart F, 20 CFR Part 405, Section 405.604 93
R. Federal Register Volume 39, No. 12, Subpart F, 20 CFR Part 405, Section 405.1120 95
S. Federal Register Volume 39, No. 12, Subpart T, 20 CFR Part 405, Section 405.1902-1903-1904-1905 96



BLEED THROUGH

Page

TABLE OF AUTHORITIES

Cases:

Paul J. Bell, Jr. v. R.H. Burson (Decided May 24, 1971) 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 22

Board of Regents of State Colleges v. David F. Roth, Etc., (Decided June 29, 1972) 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 23

Gladys Boddie v. State of Connecticut, et al., (Decided March 2, 1971) 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 22

California Department of Human Resources Development v. Judith Java (Decided April 6, 1971) 402 U.S. 121, 28 L. Ed. 2d 666, 91 S. Ct. 1347 22

Everett Plywood Corporation v. The United States, 512 Fed 2d 1082 (1975) 25

Margarita Fuentes v. Robert L. Shevin (Decided June 12, 1972) 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 23

Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 19, 22, 24

Goldstein v. State of California, 412 U.S. 546, 37 L. Ed. 2d 163, 93 S. Ct. 2303 31

Norval Goss v. Eileen Lopez (Decided Jan. 22, 1975), 95 S. Ct. 729, 42 L. Ed. 2d 725 21

North Georgia Finishing, Inc. v. DiChem, Inc., (Decided Jan. 22, 1975), 95 S. Ct. 719 20, 21

Charles R. Perry v. Robert P. Sindermann (Decided June 29, 1972), 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 23, 24

Page

Shady Acres Nursing Home v. Canary, 39 Ohio App. 2d 45 (1973) 19, 30, 33

Soni v. Board of Trustees of University of Tennessee, 513 Fed. 2d 347 (1975) 26

State of Wisconsin v. Norma Grace Constantineau, (Decided Jan. 19, 1971) 400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 21

Charles Wolff, Jr. Etc., et al. v. Robert O. McDonnell, Etc. (Decided June 26, 1974) 41 L. Ed. 2d 935, 94 S. Ct. 2963 23

BLEED THROUGH

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

	Appendix	Page
United States Constitution, Amendment V	G	68
United States Constitution, Amendment XIV	H	69
United States Constitution, Amendment X	I	70
Section 119.01(A, B,) Ohio Revised Code	J	71
Section 119.06, Ohio Revised Code	K	72
Section 119.07, Ohio Revised Code	L	74
Section 119.12, Ohio Revised Code	M	76
Section 3721.07, Revised Code, 1975 Supplement, page 43	N	80
Section 5101.51, Ohio Revised Code, 1975 Supplement, page 5	O	82
45 CFR 249.33, Federal Register page 171-175	P	84
Federal Register Volume 39, No. 12, Subpart F, 20 CFR Part 405, Section 405.604	Q	93
Federal Register Volume 39, No. 12, Subpart F, 20 CFR Part 405, Section 405.1120	R	95
Federal Register Volume 39, No. 12, Subpart T, 20 CFR Part 405, Section 405.1902-1903-1904-1905	S	96

BLEED THROUGH

IN THE
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Term, 1975

No.

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vs.

IARLES W. BATES, DIRECTOR, OHIO DEPARTMENT OF
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Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE FRANKLIN COUNTY
COURT OF APPEALS

Petitioner prays that a Writ of
ertiorari issue to review the judgment of the
upreme Court of the State of Ohio, entered in
ne above-entitled case on September 18, 1975,
verruling petitioner's Motion for an Order
irecting the Court of Appeals for Franklin
ounty, Ohio, to Certify its Record.

CITATIONS TO OPINIONS BELOW

The plaintiff filed a complaint for a
ermanent injunction and for a declaratory judg-
ent and a motion for a preliminary injunction.
ne complaint is appended to the petition as
ppendix A. The facts in support of the motion

for preliminary injunction were contained in the positively verified complaint. A hearing was held on the issuance of the preliminary injunction and the court by an unreported decision dated October 21, 1974, overruled the motion for a preliminary injunction and dissolved the temporary restraining order. A copy of that decision is appended hereto as Appendix B.

The trial court on November 21, 1974, without a motion being filed by defendant for dismissal or judgment, issued an order dismissing the case. This final order is appended hereto as Appendix C.

The decision and entry of the Franklin County Common Please Court, Case No. 74CV-09-3571, Appendix B, unreported, was appealed to the Court of Appeals for Franklin County, Ohio, Case No: 74AP-585. The decision of the Court of Appeals for Franklin County, Ohio, in Case No: 74AP-585, rendered May 15, 1975, is unreported and a copy is reprinted, and appended hereto as Appendix D. The judgment entry of the Court of Appeals is appended hereto as Appendix E.

The decision of the Supreme Court of Ohio is also unreported. Such decision is reprinted and appended hereto as Appendix F and is hereinafter referred to as the Supreme Court decision.

All appendices which have been appended hereto are made a part of this petition for a writ of certiorari.

JURISDICTION

The Supreme Court of the State of Ohio, the highest court in the State of Ohio in which a decision could be had, rendered a final judgment in the above-entitled case by overruling petitioner's Motion for an Order Directing the Court of Appeals for Franklin County, Ohio, to Certify its Record on September 18, 1975.

On December 5, 1975, this Court entered its Order Extending Time to File Petition for Writ of Certiorari by extending such time period to and including February 14, 1976.

BLEED THROUGH

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), petitioner claiming rights, priveleges and immunities and guaranteed to the petitioner under the fourteenth and fifth amendments to the Constitution of the United States were abridged and violated by action of the state.

QUESTIONS PRESENTED FOR REVIEW

In the opinion of the petitioner the following questions are presented for review:

I. CAN THE RESPONDENT, OHIO DEPARTMENT OF PUBLIC WELFARE REFUSE TO RENEW PETITIONER'S ANNUAL CONTRACT (PROVIDER AGREEMENT) TO CARE FOR STATE WELFARE PATIENTS FOR A SPECIFIED RATE FROM FUNDS SUPPLIED THE STATE UNDER TITLE XIX OF THE SOCIAL SECURITY ACT WHEN PETITIONER HAS EXPENDED FUNDS, LABOR AND TIME TO MEET MORE COSTLY AND DEMANDING FEDERAL REGULATIONS AND HAS PREVIOUSLY BEEN CERTIFIED BY THE STATE AGENCY AUTHORIZED BY LAW TO APPROVE SUCH FACILITIES WHEN THE STATE AGENCY DECERTIFIES OR DENIES CERTIFICATION WITHOUT PRIOR NOTICE OR HEARING ON THE ALLEGED DEFICIENCIES WITHOUT VIOLATING PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

II. CAN THE RESPONDENT, OHIO DEPARTMENT OF PUBLIC WELFARE, REFUSE TO RENEW PETITIONER'S CONTRACT TO CARE FOR WELFARE PATIENTS (PROVIDER AGREEMENT) WHEN RESPONDENT HAS EXPENDED MONEY, TIME AND EFFORT TO MEET MORE STRINGENT FEDERAL REGULATIONS, TO CARE FOR SKILLED NURSING PATIENTS WHOSE CARE IS PARTIALLY PAID FOR UNDER TITLE XIX OF THE SOCIAL SECURITY ACT WHEN SUCH AGREEMENT HAS BEEN RENEWED FOR SEVERAL YEARS EVEN THOUGH ALL CLAIMED DEFICIENCIES

HAVE NOT BEEN REMEDIED WITHOUT BEING AFFORDED A PRIOR HEARING REGARDING THE VALIDITY OF RESPONDENT'S GROUNDS FOR REFUSING TO RENEW THE CONTRACT WITHOUT VIOLATING PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FIFTH & FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

III. DOES NOT ENFORCEMENT OF FEDERAL STANDARDS AGAINST PETITIONER WHICH ARE SUBSTANTIALLY MORE STRINGENT THAN EXISTING STATE STANDARDS BY RESPONDENT WITHOUT COMPLYING WITH EXISTING STATE ADMINISTRATIVE REVIEW PROCEDURES VIOLATE PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH & FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

IV. DOES NOT ENFORCEMENT OF FEDERAL STANDARDS AGAINST PETITIONER WHICH ARE SUBSTANTIALLY MORE STRINGENT THAN EXISTING STATE STANDARDS BY RESPONDENT RESULT IN THE FEDERAL GOVERNMENT'S INVASION OF STATE RESERVE POWERS IN CONTRAVENTION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

BLEED THROUGH

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

	Appendix	Page
United States Constitution, Amendment V	G	68
United States Constitution, Amendment XIV	H	69
United States Constitution, Amendment X	I	70
Section 119.01(A, B,) Ohio Revised Code	J	71
Section 119.06, Ohio Revised Code	K	72
Section 119.07, Ohio Revised Code	L	74
Section 119.12, Ohio Revised Code	M	76
Section 3721.07, Revised Code, 1975 Supplement, page 43	N	80
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STATEMENT OF FACTS

Petitioner owns and operates a skilled nursing home in Canton, Ohio, licensed by the Ohio Department of Health, pursuant to Chapter 3721, Revised Code. Petitioner, pursuant to Section 5101.51, Revised Code, contracted with the Ohio Deparment of Public Welfare, to provide skilled nursing care to welfare recipients for a specified rate. Section 5101.51, Revised Code, provides for the direct payment by the respondents to persons and corporations providing medical assistance to various welfare recipients by virtue of federal funds, channelled to the state under Title XIX (19) of the Social Security Act, 49 Stat. 620 (1935), 42 U.S.C. 301. In order for a nursing home to be eligible to enter into such a contract (Provider Agreement) and receive direct reimbursement for care rendered to eligible persons, the home must have a state license and a single state agency for licensing must certify that the home meets state adopted regulations and federal regulations adopted by the Secretary of Health, Education and Welfare. 45 C.F.R. 249.33.

The Petitioner was licensed and certified by the Ohio Department of Health, pursuant to 45 C.F.R. 249.33 as a "skilled nursing home", indicating full compliance with both state and federal requirements. The certification was, in effect, a direct ruling by the highest licensing authority of the state that the petitioner was in compliance with not only state licensing provisions, but the federal standards prescribed for such facilities by the Secretary of the Department of Health, Education and Welfare. 20 C.F.R. 405.1101 through 405.1137.

The Provider Agreement executed by the petitioner and the Ohio Department of Public Welfare, is limited by regulation to a period of one year. Renewal of the agreement is subject to the same conditions including certification as the original agreement. 20 C.F.R. 405.604. The respondent, Ohio Department of Public Welfare, in this case, upon expiration of petitioner's provider agreement, continued payments in spite of a dispute over compliance and certification of petitioner's home. Respondent, some months after the end of the agreement, without prior

BLEED THROUGH

hearing regarding the alleged deficiencies, and the dispute between respondent and petitioner, informed petitioner that they would deny the renewal of his agreement and terminate payments at the higher rate set forth in the agreement. Respondent sent petitioner the following letter dated September 12, 1974:

"Convalescent Care Incorporated
315 McKinley Avenue NW
Canton, Ohio 44702

Attention: Dr. Peter C. Kern, Owner

Dear Mr. Kern:

This letter will serve written notice to you by registered mail, that, pursuant to relevant sections of 45 CFR 234, the Ohio Department of Public Welfare is choosing not to renew your eligibility for vendor payments made to the 32 bed Skilled Nursing section under Title XIX of the Social Security Act, effective October 12, 1974.

This action is being taken for the following reasons:

On June 30, 1973, the Provider Agreement between the above stated facility and the Ohio Department of Public Welfare was terminated. The initial surveys for recertification were made by the survey agency, Ohio Department of Health, on 7/11/73 and 7/12/73. The last date on the Plan of Correction was entered as 4/1/74. Re-surveys were made on 6/1, 6/19 and 7/25/74, at which time only 7 out of 15 deficiencies had been corrected. The survey agency found the facility to still be in non-compliance with the Life Safety Code. Therefore, on the basis of the preceding information, the Ohio Department of Public Welfare will not enter into a new Provider Agreement with your facility as a provider of skilled nursing services.

You have a right to a state hearing on this action if you request it within thirty days of the mailing date of this letter. Your rights to this due process hearing does not require that the Ohio Department of Public Welfare continue payments to you during the pendency of your request for a state hearing. Among the rights provided, you have the right to have a state hearing if you request the same within thirty days of the mailing of this letter.

However, we wish to make it clear that you do not have a right to a due process hearing prior to the action which we are proposing. Thus, even if you request a state hearing within thirty days of the mailing of this letter, the Ohio Department of Public Welfare will proceed to terminate your eligibility for vendor payments, effective October 12, 1974.

Sincerely,

Charles W. Bates, Director
Ohio Department of Public Welfare

CWB/mf

cc: County Welfare Department
Ohio Department of Health
Assistance Payments
Fiscal Review
Office of Legal Affairs
Medical Assistance Supervisor
DPW File"

The Petitioner, prior to the effective date of the termination of his vendor payment rate, filed a complaint in the Common Pleas Court of Franklin County, Ohio, seeking a temporary and permanent injunction and a declaratory judgment by the court to the effect that the respondents could not deny certification and renewal of his provider agreement without prior hearing. The complaint also sought to have the court determine that the certification process was, in effect, licensing (as that term was defined in the Ohio Administrative Procedure

BLEED THROUGH

Act, Section 119.01 (B), Revised Code). Petitioner contended that not only did Chapter 119, Revised Code, entitle him to prior hearing but that an interpretation denying the application of Chapter 119, Revised Code, would result in a denial of due process of law and equal protection.

Respondents also argued that the imposition of higher standards than those required by the state licensing law by the Secretary of Health, Education and Welfare, to participate in the federally endowed direct payment for care of welfare recipients, is a violation of the Tenth Amendment to the Constitution of the United States because the federal government is not specifically authorized to regulate state nursing homes, and cannot buy that right by funding state administered programs. The thrust of petitioner's argument in the state courts was:

1. The repondent, by virtue of the expenditure of money, time and effort, the continued renewal of provider agreements and the payment of the contract rates for care of recipients after expiration of the provider agreement, had such an expectancy of the continuation of payments at the established rate and a right to a continuation of care of recipients that petitioner was entitled to a prior hearing before the rate was reduced and they were denied renewal of their provider agreement.

2. The "certification" procedure, which is the key to the renewal of the "provider agreement", is in effect, an annual licensure and it is such a valuable entitlement that the petitioner is entitled to a prior hearing before it is denied.

3. Denial of a prior hearing before revoking certification is mandatory because all other state licensees in Ohio are guaranteed a hearing and judicial review under Chapter 119, Revised Code, prior to revocation of license or denial of renewal of a license. Denial of such right under the circumstances set forth in this case would deny petitioner due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The regulation of nursing homes is a right reserved to the states and the Secretary of the Department of Health, Education and Welfare cannot impose standards for state licensed nursing homes which are more stringent than those prescribed by the state even though federal money is used to pay for the care of patients since the Tenth Amendment to the Constitution of the United States reserves such regulatory authority for the state.

The petitioner sought a preliminary injunction. The evidence to support his application for a preliminary injunction was the positively verified complaint. The state court heard oral argument upon the application for the preliminary injunction and by decision, denied the preliminary injunction and dissolved the temporary restraining order which was granted upon the filing of the complaint. The Attorney General's office filed an answer to the complaint but did not file a motion to dismiss nor a motion for summary judgment.

The trial court, without further hearing and without any formal motion, dismissed the complaint apparently on the grounds that the complaint did not state a cause of action. The trial court, in effect, ruled as a matter of law that the petitioner was not entitled to a prior hearing on decertification or denial of renewal of the provider agreement and that the Administrative Procedure Act, Chapter 119, of the Revised Code, did not apply nor did the failure to apply it affect petitioner's constitutional rights. The Court of Appeals sustained the trial court's rejection of petitioner's arguments. The court, in sustaining the trial court, Appendix D, said at pages 9 to 11 of the unreported decision:

> "By the second assignment of error, plaintiff contends that it has a right of appeal, pursuant to R.C. Chapter 119. This assignment of error is not well taken for the reasons stated in Shady Acres, supra. Furthermore, the complaint clearly reveals that, even if such appeal were available, plaintiff has not yet exhausted the administrative remedies available to it.

BLEED THROUGH

"Plaintiff does contend that Shady Acres can be distinguished in that the full import of the definition of agency set forth in R.C. 119.01(B) was not reviewed by this court therein. However, we find no reason to reach a different result than that reached in Shady Acres. There is no statute making the functions of the Department of Welfare subject to R.C. Chapter 119, nor does the provider agreement constitute a license within the meaning of R.C. 119.01. Accordingly, the second assignment of error is not well taken.

"The last three assignments of error are interrelated, although they refer to different state agencies. With respect to each of these agencies, the Department of Health, the Department of Industrial Relations, Division of Factory and Building, and the State Fire Marshal, adjudications under applicable law are subject to the Administrative Procedure Act, R.C. Chapter 119.

"There is no allegation herein that there were adjudication orders made by any of these three state agencies as to matters within their purview under applicable state law. Had such adjudication orders been made, plaintiff would have had a right to an administrative hearing and an administrative appeal. The three state agencies apparently made investigations not as to plaintiff's compliance with applicable state law, but as to plaintiff's compliance with the Life Safety Code under the federal law and regulations. The agencies apparently submitted reports as to their findings to the Department of Welfare. Such investigations and reports do not constitute adjudications by those agencies under the applicable state law. Plaintiff has, if it availed itself of it, an opportunity for a hearing upon the question of the correctness of the finding of these agencies, such hearing to be conducted by the Department of Welfare in accordance with the September 12, 1974, letter quoted above. It is

not necessary that the three other state agencies conduct hearings in connection with their investigation and reports to the Department of Welfare because no orders to enforce such findings will emanate from the three other state agencies. Although the complaint refers to investigations by three state agencies, the September 12, 1974, letter refers only to the Department of Health as a 'survey agency.' There is no indication herein that the defendants relied upon actions of any of the other three agencies in enforcing state law-within their respective purview or in issuing orders or making adjudications with regard thereto. Accordingly, the third, fourth, and fifth assignments of error are not well taken."

Judge McCormac dissented and we believe ably stated the case for the petitioner at pages 12 thru 16 of the decision, Appendix D:

"Appellant operates a nursing home which was receiving patients from the Ohio Department of Public Welfare, who, through a provider agreement with the federal government, was paying a stipulated daily rate for providing skilled nursing care to welfare recipients accommodated therein.

"Title XIX of the Social Security Act provides for certain standards for payment by the federal government through a state agency for welfare recipients in a skilled nursing home. Those standards are different from standards established by the state of Ohio. Under the federal law, an agency of the state, in this instance the Ohio Department of Public Welfare, is designated as the agency responsible for seeing that these standards are fulfilled so that the payment is made only to nursing homes which meet the applicable federal standards. In this particular case several other agencies of state government, to-wit, the Department of Health, Department of Industrial Relations, and State Fire Marshal, reported to

BLEED THROUGH

the Ohio Department of Public Welfare that appellant's nursing home did not comply with applicable federal standards. As a result of those reports, and without prior hearing appellant was notified that its nursing home would not be recertified to receive additional federal payments under the provider agreement.

"Appellant filed a complaint for an injunction and declaratory judgment against appellees to prevent them from refusing to renew the provider agreement, based on the alleged noncompliance with federal standards, without according appellant a prior evidentiary hearing. The action dismissed for failure of plaintiff's complaint to state a claim upon which relief can be granted. In order to sustain the dismissal, it must appear beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Conley v. Gibson (1957), 355 U.S. 41.

"Appellant is entitled to the most favorable inferences from its complaint. Those inferences are, among others, that there is a de facto, if not legal, right to continued certification as a skilled nursing home under Title XIX of the Social Security Act unless there can be shown to be noncompliance with federal standards. Appellant alleges in its complaint that it has complied with federal standards and that termination of the agreement will deprive it of needed revenue to its irreparable damage. At this point there has been no opportunity to prove the amount of economic harm that will be done to appellant if it is not certified under the provider agreement, and there has been no opportunity to present proof as to the manner in which nursing homes are recertified under the provider act or the expectation a nursing home has of recertification if they continue to comply with federal standards. It seems possible, if not highly probable, that recertification under the provider agreement is automatic unless state agencies

designated to investigate certain aspects of compliance report to the Department of Public Welfare that the nursing home fails to comply with federal standards. As noted in the majority decision, there is no prior opportunity to challenge the reports of the Department of Health, Department of Industrial Relations, or the State Fire Marshal since appellant's state license has not been affected. Yet these reports provide the very basis for refusal to recertify a nursing home for continued payments under the provider agreement. In summary then, appellant may be able to prove under the allegations of its complaint that it has complied with federal standards applicable to a skilled nursing home under the Life Safety Code, and that state agencies have misconstrued these standards, resulting in refusal to recertify it has a skilled nursing home and in failure to receive payments to which it would otherwise be entitled. It may also be able to prove that this recertification has caused substantial economic detriment to it. Further proof may be that, as a practical or legal matter, recertification is automatic unless there is an alleged violation of federal standards.

"The issue then is whether the complaint possibly indicates loss of a valuable property right, as described by the United States Supreme Court, to which there are due process rights of prior hearing guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution.

"Two cases cited in the majority decision indicate to me that appellant may be able to prove that its interest in recertification is a protected property interest to which a prior right of hearing is required. The first case is that of Board of Regents v. Roth (1972), 408 U.S. 564. Here the court held that, to have a property interest in a benefit, a person must have more than an abstract need or desire for it; he must instead have a legitimate claim of entitle-

BLEED THROUGH

ment to it. Appellant may be able to present evidence that the state policy implemented by appellee Ohio Department of Public Welfare is that recertification automatically results unless reports are received indicating noncompliance with the federal law. It is highly improbable that the evidence will be otherwise, as certainly the state cannot discriminate between complying nursing homes. This evidence would indicate a legitimate claim of entitlement to recertification in the event of compliance with federal law rather than an abstract need or desire. In Perry v. Sindermann (1972), 408 U.S. 543, the United States Supreme Court held that a nontenured teacher had a right to an evidentiary hearing prior to termination of his contract where there was an allegation that the college had a de facto tenure program. The facts in this case indicate that there may be a de facto program of continued certification in the event of compliance with federal standards. Perry also supports appellant's contention that its action should not have been dismissed for failure to state a complaint.

"The one remaining stumbling block standing in the way of reversal seems to be the holding in Shady Acres Nursing Home, Inc., v. Canary (1973), 39 Ohio App. 2d 47. That decision would be applicable if the evidence fails to show that appellant has a protected property interest. The mere fact that it is a provider agreement which has certain termination dates does not in and of itself decide that question and should not be interpreted as such. The nontenured teaching contract in Perry also has a stated termination date but, even so, if there is a de facto program of continuation, a prior evidentiary hearing is required under the Fifth and Fourteenth Amendments of the United States Constitution.

"Consequently, the case should be remanded to the trial court with instructions to determine whether appellant can present proof of a property interest to which it has

a legitimate claim of entitlement and, if so, to grant appellant a hearing where it can be informed of the grounds for the state's failure to certify and have an opportunity to challenge its sufficiency prior to loss of certification.

"For the reasons expressed in this dissenting opinion, the judgment of the trial court should be reversed, assignment of error number one should be sustained, and the case remanded for further action consistent with this decision."

The Supreme Court of Ohio overruled the motion to certify without opinion. We believe that this court should grant the petition for a writ of certiorari in light of the bureaucratic maze that is developing in the nursing home business regarding certification and renewal of agreements. We submit that after the fact hearings, even if back payment is granted, will not prevent the loss suffered in the interim by the loss of revenue and reputation. The state and federal government by one means or another, publicizes the decertification and denial of the provider agreement. This type of activity not only causes loss of revenue during the period while a nursing home is seeking a reversal of the decision, but it causes a loss of new welfare patients and stifles any private business which might be generated to fill up the beds that are vacated by welfare patients.

The devastating effect of the decertification in regard to the home's public image is such a detriment that to suffer such punishment without recourse and without prior hearing results in a denial of a valuable governmentally created right without due process of law.

We submit a single standard for state licensing and federal approval is not only consistent with fair play but it is a practical solution to this problem. One procedure for denial of license, certification and contract, guarantees consistency, fairness and due process. We urge the court to take this case and reverse the decision of the trial court so that a trial may be had to demonstrate the severe impact on

BLEED THROUGH

nursing homes of denying prior hearing before denying certification and denying renewal of provider agreements.

REASONS FOR GRANTING THIS WRIT

I. Can the Respondent, Ohio Department of Public Welfare refuse to renew Petitioner's annual contract (Provider Agreement) to care for state welfare patients for a specified rate from funds supplied the state under Title XIX of the Social Security Act when petitioner has expended funds, labor and time to meet more costly and demanding federal regulations and has previously been certified by the state agency authorized by law to approve such facilities when the state agency decertified or denies certification without prior notice or hearing on the alleged deficiences without violating petitioner's right to due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States?

II. Can the Respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract to care for welfare patients (Provider Agreement) when respondent has expended money, time and effort to meet more stringent federal regulations, to care for skilled nursing patients whose care is partially paid for under Title XIX of the Social Security Act when such agreement has been renewed for several years even though all claimed deficiencies have not been remedied without being afforded a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

The trial court treated the state's objection to the motion for a preliminary injunction as a motion to dismiss or treated the hearing on the motion as the sole evidence to support the complaint for permanent injunction and declaratory judgment and dismissed the complaint. The court at page 3 of the October 21, 1974 decision states the reason for the dismissal as follows:

> "Our Court of Appeals last year had occasion to consider the case of Shady Acres v. Canary, 39 O. App. 2d 47 (1973), and ruled that upon expiration of a provider agreement no hearing need be held. At page 65 the decision stated:
>
> " 'the necessary holding, therefore, according to conclusions in this decision, ante, is that the lapsed provider agreements terminated by the included provisions do not require a hearing, there being no property interest involved demanding such an exercise of "due process."'
>
> "And in the Court's Summary Conclusion, at page 67, the Court stated:
>
> "'The trial court's finding that a hearing is a condition precedent to a refusal to renew a provider agreement is in error.***.'
>
> "Earlier, at page 66, the Court said:
>
> "'The finding of the trial court that the acts of decertification amounted to a partial revoking of a nursing home state license is in error.'
>
> "Said case is not directly in point but suggests the Court of Appeals' attitude as to the law which should be applied in the instant case."

BLEED THROUGH

The respondent argued that under the facts in this case the plantiff-appellant built a business and expended large amounts of money to comply with the stringent standards imposed by the federal bureaucracy to be eligible to care for "skilled" nursing welfare patients. The evidence would indicate that this investment is just as effectively taken by refusal to renew an agreement as it would be if the home were decertified and the agreement was terminated during the period of the agreement. We believe that it is painfully evident that the respondent learned the simple lesson that there are usually two ways to skin a cat. The court in Shady Acres Nursing Home v. Canary, 39 Ohio App. 2d 45 (1973) ruled that the agency had to grant prior hearings before decertification and termination but not in cases where the Ohio Department of Public Welfare refused to renew the agreement after its expiration. Thus, the Respondent using this rule simply waits for the agreement to lapse, uses the Health Department's termination of certification and denies renewal.

The petitioner under this procedure is effectively denied his continued right to care for welfare skilled nursing patients and loses his investment just as he would if there was a decertification and a termination of the agreement within the period of the contract. The trial court ignored the fact that a reduction of income while a business fights an interminable and lengthy battle with a federally funded multi-state agency is tantamount to bankruptcy. The petitioner not only loses the additional money and the chance of acquiring new paying welfare patients, but more significantly, he loses his reputation and his right to private patients because the respondent and their federal counterparts proudly announce to the public that the home has been decertified and that the home has been denied the right to keep "welfare" recipients. We believe if such action by respondent does not result in the loss of a valuable entitlement then none exists. The Supreme Court of the United States in Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011, effectively stated the rule regarding prior due process hearings to protect governmentally created entitlements in footnote eight as follows:

"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '(s)ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.' Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale LJ 1245, 1255 (1967). See also Reich, The New Property, 73 Yale LJ 733 (1964)."

The United States Supreme Court since Kelly has decided a number of cases which have enlarged and expanded the right of due process to protect what is sometimes referred to as the "new property." The most recent of these cases confirm our contention that the petitioner has a valuable governmentally created right to continue keeping welfare patients and his certification and reputation until respondent, Ohio Department of Public Welfare grants a prior hearing. The Supreme Court of the United States in North Georgia Finishing, Inc. v. DiChem Inc., (Decided Jan. 22, 1975), 95 S. Ct. 719 stated:

"We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying due process."

BLEED THROUGH

The North Georgia, supra, case held invalid a Georgia garnishment statute which allowed attachment upon an affidavit of an attorney without court review based upon statements of mere conclusions. Even more persuasive is the Supreme Court of the United States ruling in Norval Goss v. Eileen Lopez (Decided Jan. 22, 1975), 95 S. Ct. 729, 42 L. Ed. 2d 725, wherein the court held that a student's right to education was protected by the due process clause and held invalid a law which permitted a ten (10) day suspension without prior due process hearing. Justice White in describing the right protected in the student's suspension in Goss v. Lopez, 42 L. Ed. 2d 725, said at page 736:

> "Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."

The operator loses a portion of his income that represents his profit, his right to new business and his reputation. We believe the interest and loss is substantial and that he is entitled to a prior hearing. We believe the foregoing rulings when considered with the following precedents mandate that before a renewal is denied or a home is decertified there must be a prior evidentiary hearing:

1. State of Wisconsin v. Norma Grace Constantineau (Decided January 19, 1971) 400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507. The Supreme Court of the United States sustained the ruling of a three judge District Court enjoining the enforcement of a Wisconsin statute which provided authority to local authorities to blacklist a person from the purchase of intoxicating liquor without giving the person notice and an opportunity to be heard prior to such action. The Supreme Court in this case simply stated: "we agree with the District Court that private interest is such that those requirements of procedural due process must be met".

2. Paul J. Bell, Jr. v. R. H. Burson (Decided May 24, 1971) 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586. The Supreme Court of the United States ruled that the State of Georgia could not, under the Georgia safety responsibility statute, revoke or suspend an uninsured motorist's vehicle registration and driver's license without granting a prior procedural due process hearing to determine whether there was a reasonable possibility that the judgment could be secured against the licensee as the result of an accident. The Supreme Court commented at page 94, "once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood." With that statement the court put to rest a long standing rule that the right to drive was a privilege and not a property right.

3. Gladys Boddie v. State of Connecticut, et al. (Decided March 2, 1971) 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780. The Supreme Court in this case ruled that the right to access to the courts was such a valuable entitlement that a person could not be denied access to the courts even for the purpose of seeking a divorce without prepayment of costs. The court in Boddie clearly held that plaintiff had such an interest in access to the courts to dissolve an untenable marriage that such right could not be taken by requiring pre-payment of costs by an indigent.

4. California Department of Human Resources Development v. Judith Java (Decided April 6, 1971) 402 U.S. 121, 28 L. Ed. 2d 666, 91 S. Ct. 1347. The Supreme Court ruled that the Social Security Act precluded the State of California from terminating unemployment benefits pending disposition of an employer's appeal of the allowance. The three judge District Court concluded that not only did the act require pre-hearing but that the doctrine of Goldberg v. Kelly, supra, required such conclusion. The Supreme Court ruled on the statutory ground.

BLEED THROUGH

5. Margarita Fuentes v. Robert L. Shevin (Decided June 12, 1972) 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983. The Supreme Court of the United States held that the Florida and Pensylvania replevin laws authorizing summary seizure of goods and chattels by state agency on an ex parte application by a private person who posted a security bond for double the value were invalid in that they violated the due process clause of the Fourteenth Amendment because they denied the property owner the right to prior opportunity to be heard before the chattels were taken. The court in deciding this case, said at page 570 of the decision; "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' "

6. Charles R. Perry v. Robert P. Sindermann (Decided June 29, 1972), 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694. The Supreme Court held that termination of a teacher's contract even though he did not have formal tenure, was invalid if he were not given a prior procedural due process hearing if the teacher could show that he had an expectancy of employment. The court in effect said that if he had been employed for some years and that a de facto system of tenure existed his rights had matured to the point where he must be given a prior hearing based upon his expectancy of re-employment. The decision cites the contrary holding of the court in Board of Regents of State Colleges v. David F. Roth, Etc., (Decided June 29, 1972) 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701, wherein the court commented; "In order to be entitled to hearing he must show that the decision not to re-hire him somehow deprived him of an interest in, 'liberty' or that he had a 'property' interest in continued employment.***."

7. Charles Wolff, Jr. Etc., et al. v. Robert O. McDonnell, Etc. (Decided June 26, 1974) 41 L. Ed. 2d 935, 94 S. Ct. 2963. The Supreme Court ruled that state prison regulations

which permit prison administrators to take away good time for misconduct while in the institution must guarantee a minimum prior procedural due process hearing. The court at page 951 of the decision said; "But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state created right is not arbitrarily abrogated."

We submit that in light of the decisions of the Supreme Court of the United States since Goldberg v. Kelly, supra, there is no question that when a licensed nursing home operator expends substantial funds, energies, and assets to comply with federal and state standards to participate in a business which is based upon the expectancy of continued profit from his agreement, the continued referral of welfare patients to be cared for in his institution at a stated rate, and the reputation of meeting the standards required, the denial of a continuance of that expectancy brings into being a right that is protected by the due process clause of the federal constitution. We submit that this case should be remanded to the trial court so that evidence may be submitted to substantiate respondent's losses, his expenditure of monies, time and energy and assets, in expectance that his right to care for welfare patients will continue and to permit evidence establishes the loss suffered by denial of renewal and certification without prior hearing. The Appellate Courts of Ohio should have reversed and remanded this case so that the evidence might have been presented to support the contention as to the value of the entitlement and the loss of reputation.

Justice Stewart in Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694, said at page 603:

"In this case, the respondent has alleged the existence of rules and understandings,

BLEED THROUGH

promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.' We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.' 430 F 2d at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

The petitioner should be given the right to prove that he had a substantial interest not only in the continuation of the agreement but in the reputation of his business which was taken away along with his additional income. Respondent should have an opportunity to show that deficiencies do not always mean denial of renewal and that he had a right to expect renewal on a showing of a good faith effort to correct deficiencies.

The United States Court of Claims in the recent decision of Everett Plywood Corporation v. The United States, 512 F. 2d 1082 (1975), held that a company contracting with the Forest Service for the purchase of timber from government land had a right to assume that prior practice or custom of extension would be continued even though the government had warned to the contrary. The Court of Claims, in Everett Plywood Corporation, supra, said at page 1089:

"In entering into this contract, plaintiff had every reason to assume, there being nothing in the contract to the contrary, that it would receive extensions in accordance with the prevailing custom or practice. Indeed, the evidence is that, from 1960 to 1968, plaintiff did receive extensions on that basis. The rights and obligations of the parties under the contract must, therefore, be construed in light of this established practice or custom. Stoeckert v.

United States, 391 F. 2d 639, 647, 183 Ct. Cl. 152, 165 (1968). If, in refusing to extend the contract for 1969, defendant departed from that practice, and in fact used a different basis in passing on the requested extension, plaintiff's claim for breach is substainable. Cf. Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Specifically, the question is whether defendant denied the extension because it was 'disadvantageous to the United States' or on some other, and materially different, basis."

We submit that prior hearing is required in this case because of the delay in asserting the denial of renewal and the decertification to reduce the flow of funds into Petitioner's business.

The Sixth Circuit Court of Appeals in Soni v. Board of Trustees of University of Tennessee, 513 F. 2d, 347 (1975), applied the Sindermann doctrine in ruling that a professor had been let to believe that he had such permanency that he could not be terminated without hearing.

The Sixth Circuit said in Soni, supra, at page 350:

> "The District Court further held that the University 'objectively' acted toward plaintiff in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency in the academic community of the University. Upon acquiring this property interest, it cannot be terminated without procedural due process." F. Supp. at 292.

The respondents created an expectancy that petitioner's agreement would continue in spite of deficiencies. Petitioner had a profitable business which was created by government license "certification". These governmentally created entitlements cannot be revoked without prior hearing.

We submit the court should accept this case.

III. Does not enforcement of federal standards against petitioner which are substantially more stringent than existing state standards by respondent

BLEED THROUGH

without complying with existing state administrative review procedures violate petitioner's right to due process, and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States?

Plaintiff-appellant in this action had for some period of time been classified a skilled nursing home and had been caring for and receiving compensation for welfare patients under a provider agreement with the Ohio Department of Public Welfare. These agreements were entered into pursuant to Section 5101.51 of the Revised Code. In order for a home to contract or enter into such agreements the home must be certified by the agency charged by law with the responsibility of licensing such facilities by the state. The federal government by virtue of their financial participation in reimbursing the state for caring of such patients imposes standards which must be complied with in addition to those licensing requirements of the state before such agreements can be executed and be the basis for federal reimbursement.

45 C.F.R. 249.33 specifically provides that the state survey agency must certify compliance. 45 C.F.R. 249.33(a) specifically provides as follows:

"(a) State plan requirements. A State plan for medical assistance under title XIX of the Social Security Act must:

"(1) Provide that the single State agency will, prior to execution of an agreement with any facility (including hospitals) for provision of skilled nursing facility services and making payments under the plan obtain certification from:

(i) The agency designated pursuant to §250.100(c) of this chapter that the facility meets the statutory definition contained in section 1861(j) of the Social Security Act and is in full compliance with the standards prescribed by the Secretary in the regulations promulgated thereunder, except that for purposes of §405.1134(c) of this title, the agency may waive, or, for purposes of §405.1134(e)

of this title, the agency may permit, variations in the provisions therein for facilities participating only under title XIX, provided such waiver or variation is authorized under conditions promulgated by the Secretary; or

(ii) The Secretary, pursuant to section 1910 of the Act, that the facility has been determined to qualify as a skilled nursing facility under title XVIII of the Act; or

(2) Provide that the single State agency will, prior to execution of an agreement with any facility (including hospitals and skilled nursing facilities) for provision of intermediate care facility services and making payments under the plan, obtain certification from the agency designated pursuant to § 250.100(c) of this chapter that the facility meets the definition set forth under § 249. 10(b) (15) (proposed); except that in the case of an intermediate care facility determined to have deficiencies under the requirements for environment and sanitation (§ 249.12(a) (6)) or of the Life Safety Code (§ 249.12(a) (5)) it may be recognized for certification as an intermediate care facility in accordance with subparagraph (4)(iii) of this paragraph for a period not exceeding 2 years following the date of such determination provided that:

(i) The institution submits a written plan of correction acceptable to the survey agency which contains:

(A) The specific steps that it will take to meet all such requirements; and

(B) A timetable not exceeding 2 years from the date of the initial certification after publication of these regulations detailing the corrective steps to be taken and when correction of deficiencies will be accomplished;"

Skilled nursing facilities must comply with detailed regulations set forth in, subpart

BLEED THROUGH

(k) conditions of participation, skilled nursing facilities, being sections 405.1101 through 405.1137, federal register, volume 39 number 12, January 17, 1974. Contained in these regulations are provisions governing the following matters:

"Sec.	
405.1101	Definitions
405.1120	Compliance with Federal, State and local laws.
405.1121	Governing body and management.
405.1122	Patient care policies
405.1123	Physician services.
405.1124	Nursing services.
405.1125	Dietetic services.
405.1126	Specialized rehabilitative services.
405.1127	Pharmaceutical services.
405.1128	Laboratory and radiologic services.
405.1129	Dental services.
405.1130	Social services.
405.1131	Patient activities.
405.1132	Medical records.
405.1133	Transfer agreement.
405.1134	Physical environment.
405.1135	Infection control.
405.1136	Disaster preparedness.
405.1137	Utilization review."

The Life Safety Code which governs skilled nursing homes contains 197 pages. The Life Safety Code regulates buildings and is much more stringent and demanding than the Ohio Building Code. The regulations as they relate to nursing services, physicians' services, social services, and other matters are much more stringent than the Ohio Department of Health's licensing regulations dealing with nursing homes.

The plaintiff-appellant for some time had expended large sums of money in order to take advantage of the availability of state patients. Plaintiff-appellant built the business so that it was almost entirely based upon state welfare patients and a refusal to renew the license and the denial of the right to secure this type of patient could substantially impair the ability to continue in business. There is no question that the certification process described by Section

249.33, subparagraph (a), 45 C.F.R., amounts to the granting of an approval in the form of a franchise or license.

Section 119.01(a), Revised Code, defines "agency" as follows:

> "'Agency' means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking or cancelling licenses."

Section 119.01, subparagraph (B), Revised Code, defines "license" as follows:

> "'License' means any license, permit, certificate, commission, or charter issued by any agency."

It is to be noted that subparagraph (B) specifically uses the word "certificate". The language of the Federal Code or Regulations clearly requires the certification by the Ohio Department of Health. The Ohio Department of Health, after examination and inspection of the facility must issue a certificate before the defendant-appellee, Ohio Department of Public Welfare may enter into a provider agreement so that the plaintiff-appellant may care for skilled nursing care recipients and receive the rates specified under the agreement.

The Court of Appeals of Franklin County, Ohio, in Shady Acres Nursing Home, Inc. v. Canary, 39 Ohio App. 2d 47 (1973) and in this case ruled that Chapter 119,Revised Code, did not apply to the certification procedure. Section 3721.07, Revised Code, specifically permits the Director of Health to secure approvals from the Department of Industrial Relations, Division of Factory and

BLEED THROUGH

Building, Chapter 3781, Revised Code, and the State Fire Marshal, Chapter 3737, Revised Code, in the area of expertise. Each of these agencies in issuing adjudication orders is required to afford administrative hearings.

We have consistently pointed out that failure to afford prior hearing is a denial of due process and even though we have not clearly defined the discriminatory practice of granting prior hearings under Ohio law to all state licensees and not granting such protection to a valuable license created by federal regulation we feel we are entitled now to present this argument in this form because we have consistently urged the application of the Ohio law to avoid this result. We submit the court should review this case to prevent destruction of valuable rights without prior administrative review.

IV. Does not enforcement of federal standards against petitioner which are substantially more stringent than existing state standards by respondent result in the Federal Government's invasion of state reserve powers in contravention of the Tenth Amendment to the Constitution of the United States?

The Tenth Amendment to the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This basic principle of American Government is discussed by Justice Burger in Goldstein v. State of California, 412 U.S. 546, 37 L. Ed. 2d, 163, 93 S. Ct. 2303, at page 552 where he cites the comments of Alexander Hamilton in The Federalist papers as follows:

> "An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all

the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant."

The Tenth Amendment has been eroded by the constant flood tide of the Commerce Clause, Article I, Section 8, Clause 3, Constitution of the United States, which has all but rendered the Tenth Amendment meaningless.

The federal government, by contributing money to the States, has actually bought its way into areas which are not delegated to it by the Constitution of the United States. This use of taxes has given the federal government the reins to enforce police regulations within the states. The federal government by purchasing sovereignty, has subverted the Tenth Amendment to the Constitution of the United States.

We believe that the federal government by their use of tax dollars has abandoned the plan adopted by the founders of our country. We submit that the regulation and policing of nursing homes must be left to the States. What is necessary for safety of patients in one locale is not necessary in another. Safety and sanitation can go to the point of endless expenditure. How safe or clean a person wishes to be comes down to how much he is willing to pay. Some people have a fetish about these things and will go to ridiculous lengths and expend endless sums to satisfy their state of mind. The States should each have the right to decide how much safety and sanitation they wish to pay for on a minimum standard basis through the legislative process. The federal government should not be permitted to give the states back their money, thereby forcing the expenditure of even more state money to help keep people in facilities that are overly expensive. Federal bureaucracy is blind to local conditions

BLEED THROUGH

and needs. It thinks in the abstract and in a vacuum of reality. Bricks, mortar, degrees, people and products do not insure care. Written plans, programs and constant changing of theories do not guarantee that the needs of the elderly disabled patient are met. The state with their local staff can best judge and recommend to the state legislature and state departments what laws and regulations will give the maximum care, safety and sanitation for the minimum cost. The founders of our constitution felt this way and unless we accept this philosophy local control will soon be gone. Regulation of a uniform character done on a federal level results in total loss of freedom of expression. Bigness destroys initiative and individuality. We submit this case should be reviewed to determine if the federal bureaucracy can by return of state tax dollars, buy power not granted the federal government.

CONCLUSION

This case presents significant constitutional issues. From a constitutional standpoint the question is whether a nursing home operator who has for a period of years spent large sums of money to comply with stringent federal regulations in order to provide services to welfare recipients which are paid for in part by federal funds should lose the right to continue such practice by virtue of alleged violations without a prior hearing. The Court of Appeals of Franklin County, Ohio in Shady Acres v. Canary, 39 Ohio App. 2d 47, ruled that during the period of the annual provider agreement (the contract with the State Welfare Department) the operator is entitled to a prior hearing before he loses the right to payments as provided in the agreement. The Welfare Department has, by local court decision, been informed that the simple solution to their problem is to allow the annual provider agreement to expire and then without notice or hearing refuse to renew the agreement. We believe that the recent United States Supreme Court decisions cited herein dictate a finding that this practice results in a denial of due process of law.

It seems elementary that expenditure of large sums of money to meet stringent federal standards and the acceptance over many years of

the burden of caring for indigent patients and the reliance on continuance of such business is such a right that it must be protected from loss without prior hearing. This right was expended in this case because respondent continued to pay the contract price to petitioner after the expiration of the annual contract in spite of alleged decertification and deficiencies. We believe that "certification", that is approval by the state licensing authority, is in itself, a right which cannot be taken without prior hearing.

We believe that the certification procedure clearly falls within the definition of "license" as set forth in Section 119.01(B), Revised Code, thereby requiring a hearing on the issue of "decertification". A prior hearing on this issue would prevent denial of renewal of the provider agreement without prior hearing. The denial of the application of the Ohio Administrative Procedure Act, Chapter 119, Revised Code, results in a further denial of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States since all other state licensees have such protection.

Finally, the question of enforcement of higher federal standards, by virtue of money contributed by the federal government and the evasion of procedural state safeguards in regard to compliance with federal standards brings into focus the authority of the federal government to, in effect, purchase sovereignty in an area which is not delegated to them under the Constitution. We believe it is clear federal money cannot buy the right to adopt and enforce police regulations in areas that were not specifically delegated to the federal government by the Constitution of the United States. We assert that refusal to allow payment for services where the operator complies with state law, but not additional higher federal standards in effect violates the provisions of the Tenth Amendment to the Constitution of the United States.

This case is crucial in deciding whether citizens who operate a business and sell products and services to states who use federal funds can be deprived of their right to continued payment for those services at the contracted rate beyond a specified period based solely on unproved

BLEED THROUGH

allegations or on untested regulations which may exceed the agencies' legal authority to regulate. We believe "certification" is a continuing license and whether the agreement expires or not the certification which is considered in the renewal process cannot be taken without prior hearing. The rate must be continued until the certification is terminated and the denial of a new agreement postponed until a hearing is held on decertification. We think the court should accept this case and establish the principle that the right to do business with the state by virtue of a certification of compliance should not be terminated without a meaningful prior hearing.

We also believe that the time has come when this court should decide whether the federal government can buy sovereignty by returning the American citizens' tax moneys to pay for state programs which are clearly in areas reserved for regulations by the States.

The Department of Health, Education and Welfare is, in effect, regulating nursing homes in Ohio because social security money and federal tax dollars are used to pay for the care of welfare recipients. We say that such expenditure cannot buy the right to enact police regulations which are solely within the province of the States. The practice followed in this field has made a farce of state regulations. An operator can be in full compliance with the state licensing law, licensing regulations, state fire law and regulations and state building standards and be fully licensed but be ineligible to keep welfare recipients and receive money for payment at the rate set for such care. A state license cannot be taken without prior hearing and judicial review. State fire regulations and building regulations result in adjudication orders only after full hearing and review in the courts. All of this protection is lost if you keep welfare patients. We say that since the majority of the patients kept in nursing homes in Ohio are on welfare, this in effect destroys the state licensing laws and superimposes a federal law from which there is no adequate relief. We believe that it is of utmost

importance that such practice be reviewed from a constitutional standpoint. This case should be accepted by the court for review and reversed and remanded for trial so that the petitioner may prove he is entitled to the relief sought in his complaint.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

Convalescent Care, Inc.
315 McKinley Ave., N.W.
Canton, Ohio 44702

Plaintiff,

vs. Case No. 74CV-09-3571

Charles W. Bates, Director
Ohio Department of Public Welfare
408 East Town Street
Columbus, Ohio 43215

and

Ohio Department of Public Welfare
408 East Town Street
Columbus, Ohio 43215

and

Logan Burd, Director
Stark County Welfare Department
St. Francis Hotel
Canton, Ohio

and

Stark County Welfare Department
St. Francis Hotel
Canton, Ohio

Defendants.

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY
1974 Sept. 27 a.m. 10:45
THOMAS J. ENRIGHT
CLERK OF COURTS

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

FIRST COUNT:

I. Plaintiff is an Ohio Corporation licensed by the Ohio Department of Health to operate a nursing home and has been certified as a skilled nursing home under Title XIX of the Social Security Act, effective October 12, 1974.

2. Charles W. Bates, Director, is the duly appointed and acting Director of the Ohio Department of Public Welfare.

3. Plaintiff entered into a provider agreement with the Ohio Department of Public Welfare pursuant to federal and state law and plaintiff agreed to provide skilled nursing care for welfare recipients for a specified rate or on a cost formula as set forth in the agreement.

4. Defendant, Ohio Department of Public Welfare, without prior hearing, terminated the agreement but did not reduce payments or compel local agencies to remove state patients requiring such care nor prevent new patients from being placed in the home at the specified rate.

5. Plaintiff applied for recertification and complied with the requirements of the various state agencies, including the Life Safety Code. Defendants, Charles W. Bates and the Ohio Department of Public Welfare, relying on statements of the Ohio Department of Health, the Department of Industrial Relations, and the office of the State Fire Marshall, without prior hearing, now proposes to refuse to recertify said nursing home and not execute an agreement with plaintiff. Plaintiff attaches hereto defendant Ohio Department of Public Welfare's notice and makes it a part of this complaint as if fully recopied herein.

6. Plaintiff says that because of such proposed action without prior hearing plaintiff will no longer be able to care for welfare patients requiring skilled nursing care, will lose the rate specified for such patients effective October 12, 1974, and will have such patients removed from their facility.

7. Plaintiff asserts that the action taken to deny certification and execution of a provider agreement without prior hearing on the issues of compliance with the orders of the Department of Public Welfare, the Ohio Department of Health, the Ohio Department of Industrial Relations, and the State Fire Marshall's office before any of the aforementioned agencies violates Chapter 119, Revised Code; Chapter 3721, Revised Code; Chapter 3737, Revised Code, and Chapter 3781, Revised Code, and the Fifth and

Fourteenth Amendments to the Constitution of the United States and similar provisions of the Ohio Constitution.

8. Plaintiff says that defendant Charles W. Bates, Director of the Ohio Department of Public Welfare, by his proposed action will destroy plaintiff's right to care for welfare recipients, reduce income from patients now in his home, remove patients, thereby eliminating income for care, and deny him the right to continue to care for and receive compensation for patients now in the home and for future patients when he is and has been in compliance with state and federal laws. Plaintiff alleges that such action will result in substantial irreparable injury to his business for which he has no adequate remedy at law.

9. Plaintiff asserts that he has a constitutional right to a prior evidentiary hearing on the issues prior to defendant's proposed action to protect from irreparable damage resulting from such proposed action. The Ohio Department of Health, the Department of Industrial Relations and the State Fire Marshall's office are all required to afford prior hearings on adjudication orders issued by the agencies before said orders become final. In this incident defendant Bates has relied on statements of deficiencies which are orders of the various agencies which have not become final under the procedure required by law.

SECOND COUNT:

10. Logan Burd is the duly appointed and acting Director of the Stark County Welfare Department.

11. Plaintiff incorporates paragraphs 1 through 9 of the first count in this second cause of action as if fully recopied herein.

12. Defendant Logan Burd will on October 12, 1974, pursuant to defendant Bates' order or notice, remove all patients requiring skilled care from plaintiff's nursing home without prior notice or hearing on the issues set forth herein.

13. Plaintiff further says that defendant Logan Burd will blacklist plaintiff's home and will refer no further welfare patients requiring such care to plaintiff again without prior hearing on the issues set forth.

14. Plaintiff says defendant Logan Burd's proposed action of removing welfare patients requiring skilled care from plaintiff's home and not permitting placement of other new welfare patients requiring such care in plaintiff's home will result in irreparable injury for which plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands that:

1. The court grant a preliminary injunction during the pendency of this action and a permanent injunction upon final hearing enjoining the defendants, Charles W. Bates and the Ohio Department of Public Welfare, their agents and employees, and defendants Logan Burd and the Stark County Welfare Department, their agents and employees, from in any way terminating or reducing the payment for care of Ohio welfare recipients for skilled nursing care in plaintiff's home, Convalescent Care, Inc., 315 McKinley Ave., N. W., Canton, Ohio 44702; from removing such patients from plaintiff's home at 315 McKinley Ave., N. W., Canton, Ohio 44702; or from preventing the placement of future welfare patients in said home requiring skilled nursing care until plaintiff has been afforded a prior hearing on the reasons for decertification and refusal to recertify said home, said action being contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and under similar provisions of the Ohio Constitution.

2. A declaratory judgment determining that defendant Charles W. Bates and defendant Logan Burd may not decertify or refuse certification and reduce rates for care of skilled nursing patients, remove such patients and bar placement of new patients in plaintiff's facility based on alleged violation of orders of the Ohio Department of Health, the Department of Industrial Relations and the State Fire Marshall when it appears such agencies have not complied with Chapter 119, Chapter 3721, Chapter 3737, and Chapter 3731, Revised Code, and met constitu-

tional requirements for due process and prior evidentiary hearing under the 5th and 14th Amendments to the Constitution of the United States and under similar provisions of the Ohio Constitution.

3. A declaratory judgment determining that the defendants may not refuse to execute a provider agreement with plaintiff based upon alleged deficiencies in compliance with regulations or laws and reduce payments, remove patients or bar placement of patients in said home without affording plaintiff a prior hearing on the alleged violations as required by the 5th and 14th Amendments to the Constitution of the United States and Chapter 119, Revised Code.

s/
THOMPSON, SWOPE, BURNS & BISWAS
By Richard F. Swope
Attorney for Plaintiff
6810 East Main Street
Reynoldsburg, Ohio 43068
Telephone: 866-1436

STATE OF OHIO

COUNTY OF FRANKLIN, ss:

Dr. Peter C. Kern, as President of Convalescent Care, Inc., being first duly cautioned and sworn, deposes and says that he has read the foregoing complaint and that the facts stated herein are true.

CONVALESCENT CARE, INC.

By s/
Dr. Peter C. Kern, President

Sworn to before me and subscribed in my presence this 27th day of September, 1974.

s/ Richard F. Swope
Notary Public

APPENDIX B

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Convalescent Care, Inc.	:	
PLAINTIFF	:	
vs.	:	Case No. 74CV-09-3571
Charles W. Bates, Director Ohio Dept. of Public Welfare et al.	:	
DEFENDANTS	:	

DECISION AND JOURNAL ENTRY

Rendered this 21st day of October, 1974.

MARSHALL, J.

On September 27, 1974 Plaintiff filed its complaint for Injunction and Declaratory Judgment. On that date a short hearing was had and resulted in the signing of a "Temporary Restraining Order," approved by Plaintiff. In that order Defendants were restrained from terminating or reducing payment for care of welfare patients being cared for in Plaintiff's skilled nursing home until the matter could be heard for a preliminary injunction on Oct. 4, 1974.

A hearing was had on October 4, 1974, and the parties relied on their briefs and the law believed to favor their position for the Court to act on the matter of a preliminary injunction as the appropriate action at said time in this case.

The urgency recited in the Complaint for extremely early consideration of the request for Preliminary Injunction was the fact that Plaintiff's license by the Ohio Department of Health to operate a nursing home under a certificate as a "skilled nursing home" under Title XIX of the Social Security Act was due to expire October 17, 1974. Plaintiff had been notified

by the Ohio Department of Public Welfare that it would not renew the agreement and would not recertify plaintiff's said home, resulting in the inability of said home to care for welfare patients requiring skilled nursing care.

Plaintiff complains that the Department's action was taken without prior hearing on the issue of compliance with the orders of various departments, agencies and the State Fire Marshall. Specifically, plaintiff contends that the action of the Department violated plaintiff's constitutional rights as guaranteed by the 5th and 14th Amendments to the Consitution of the United States and similar provisions of the Ohio Constitution, by not affording plaintiff a prior evidentiary hearing on the issues before taking its proposed action.

By the passage of time plaintiff's license to operate as a nursing home to care for Medicare recipients under the Medicaid Program which authorizes reimbursement from federal funds to Medicaid providers who come up to Federal standards and do not violate the Life Safety Code has now terminated, and has not been removed.

Defendants do not have the power to revoke plaintiff's license to operate as a nursing home and serve patients it chooses to serve. Under federal law, 45 C.F.R. 249.33, the state may only enter into agreements with homes when the Life Safety Code is satisfied in order for the state to be reimbursed from the Federal government for its share of funds paid to eligible Medicaid providers.

Our Court of Appeals last year had occasion to consider the case of Shady Acres v. Canary, 37 O. App. 2d. 47 (1973), and ruled that upon expiration of a provider agreement no hearing need be held. At page 65 the decision stated:

> "the necessary holding, therefore, according to conclusions in this decision, ante, is that the lapsed provider agreements terminated by the included provisions do not require a hearing, there being no property interest involved demanding such an exercise of 'due process.'"

And in the Court's Summary Conclusion, at page 67, the Court stated:

> "The trial court's finding that a hearing is a condition precedent to a refusal to renew a provider agreement is in error.***."

Earlier, at page 66, the Court said:

> "The finding of the trial court that the acts of decertification amounted to a partial revoking of a nursing home state license is in error."

Said case is not directly in point but suggests the Court of Appeals' attitude as to the law which should be applied in the instant case.

The Department felt under the circumstances that plaintiff's nursing home, although licensed as such under Ohio law, could no longer be certified as a "skilled nursing home" under Title XIX of the Social Security Act, and therefore it could not renew the agreement which was a requirement to qualify plaintiff's nursing home for care of Medicaid recipients under the Medicaid Program. The Department ran the risk of losing federal funds as to other Medicaid providers who come up to Federal standards if it improperly certified plaintiff's home.

At this time we hold that plaintiff is not entitled to a preliminary injunction which seeks to mandate affirmative action. It has not shown that it is entitled to a mandatory preliminary injunction because of the existence of an emergency. It has not shown that the order it seeks would not result in a danger of greater harm to the defendants than there would be benefits to the plaintiff.

The Temporary Restraining Order of September 27, 1974 is set aside.

George B. Marshall, Judge

BLEED THROUGH

APPEARANCES:

Richard F. Swope
Attorney for Plaintiff

Steven Ball
Assistant Attorney General
Attorney for Defendants

APPENDIX C

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Convalescent Care, Inc. :

PLAINTIFF :

vs. : Case No. 74CV-07-3571

Charles W. Bates, et al :

DEFENDANTS :

E N T R Y

On October 21, 1974, we rendered our Decision and Journal Entry denying plaintiff a Preliminary Injunction, and setting aside the Temporary Restraining Order of September 27, 1974.

The reasons for such action included a finding that the Department could refuse to renew a license to plaintiff under a certificate as a "skilled nursing home" under Title XIX of the Social Security Act. The license expired under its terms on October 12, 1974 and was not renewed. Since the Department failed to renew the agreement and would not recertify plaintiff's nursing home as a "skilled nursing home" plaintiff no longer can care for welfare patients requiring skilled nursing care under the medicaid program.

By virtue of our Decision and Journal Entry of October 21, 1974 we found plaintiff not entitled to a preliminary injunction, as prayed for in the Complaint, we held that plaintiff was not entitled to a Mandatory Preliminary Injunction, and we set aside the Temporary Restraining Order of September 27, 1974.

Also by virtue of said decision of October 21, 1974, we ruled that the Department could refuse to renew an agreement and could refuse to recertify plaintiff's home without a prior evidentiary hearing on the issue of compliance or failure of compliance with various orders of state departments and agencies. We further called attention to the fact that the license or agreement for the year ending October 12, 1974, came to an end, without being renewed, and therefore by the passage of time plaintiff was no longer eligible to charge as a "skilled nursing home" under Title XIX of the Social Security Act.

We believe that we have disposed of matters which are the subject of declaratory judgment determination requested by plaintiff's Complaint. This case is accordingly dismissed and terminated.

George B. Marshall, Judge

APPEARANCES:

Richard F. Swope
Attorney for Plaintiff

Steven L. Ball
Assistant Attorney General
Attorney for the Defendants

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Convalescent Care, Inc., 315 McKinly Avenue, N.W., Canton, Ohio 44702,	:	
Plaintiff-Appellant,	:	
v.	:	No. 74AP-585
Charles W. Bates, Director, Ohio Department of Public Welfare,	:	
and	:	
Ohio Department of Public Welfare,	:	
and	:	
Logan Burd, Director, Stark County Welfare Department, St. Francis Hotel, Canton, Ohio	:	
and	:	
Stark County Welfare Department, St. Francis Hotel, Canton, Ohio	:	
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on May 15, 1975

No. 74AP-585

THOMPSON, SWOPE, BURNS & BISWAS,
MR. RICHARD F. SWOPE,
6810 East Main Street,
Reynoldsburg, Ohio 43068,
For Plaintiff-Appellant.

MR. WILLIAM J. BROWN, Attorney General,
MR. JAMES W. McCARTHY and
MR. JAMES CARPENTER, Assistants,
State Office Tower,
30 East Broad Street,
Columbus, Ohio,
For Defendants-Appellees Charles W. Bates and Ohio Department of Public Welfare.

MR. DAVID D. DOWD, JR., Stark County Prosecuting Attorney,
MR. JAMES R. UNGER, Assistant,
Stark County Court House,
Canton, Ohio 44702,
For Defendants-Appellees Logan Burd and Stark County Welfare Department.

WHITESIDE, J.

Plaintiff appeals from a judgment of the Franklin County Court of Common Pleas dismissing its action in declaratory judgment and raises five assignments of error, as follows:

> "1. The trial court erred in ruling as a matter of law that certification and renewal of a provider agreement of a nursing home for the purposes of payment of skilled rates for care of welfare recipients pursuant to a prior vendor agreement entered into under Section 5101.51, Revised Code by defendant-appellee and plaintiff-appellant were not such valuable entitlements that a prior evidentiary hearing must be held before termination and

refusal to renew the agreement in order to avoid violating plaintiff-appellant's right of due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States."

"2. The trial court erred in ruling as a matter of law that certification by the agency designated in 45 CFR, Section 250.100(c) does not result in the issuance of a 'license' as that term is defined in Section 119.01(B), Revised Code, thereby constituting the Ohio Department of Health an 'agency' as defined in Section 119.01(A), Revised Code, thereby requiring compliance with Chapter 119, Revised Code, when denying renewal of certification or a provider agreement.

"3. The trial court erred in ruling the Ohio Department of Health may exercise its authority and notify the Ohio Department of Public Welfare of the plaintiff-appellant's failure to comply with an adjudication order relating to certification and renewal of vendor agreements before the adjudication order becomes final after full compliance with Chapter 119, Revised Code.

"4. The trial court erred in ruling that even though adjudication orders of the Department of Industrial Relations, Division of Factory and Building, are subject to review by the Board of Building Appeals and the Common Pleas Court, pursuant to Chapter 119 and Section 3781.19, Revised Code, before they become final they may be the basis of refusal to certify by the Ohio Department of Public Health and denial of renewal of a provider agreement.

"5. The trial court erred in ruling that even though adjudication orders of the State Fire Marshal are subject to hearing before the Fire Marshal and to judicial review pursuant to Sections 3737.20, 3737.21 and 119.12, Revised Code, before they become final, they may be used as the basis for refusal to certify a skilled nursing home by the Ohio Department of Health and by the Ohio Department of Public Welfare thereby deny renewal of a provider agreement.

Although not specifically stated in the judgment entry of the trial court, it would appear, since there was no trial on the merits, that the action was dismissed for failure of plaintiff's complaint to state a claim upon which relief could be granted, which defense was raised as the second defense in defendants' answer.

The basic issues raised herein were discussed and determined by this court in Shady Acres Nursing Home, Inc., v. Canary (1973), 39 Ohio App. 2d 47. In that case, we stated in part, at pages 64 and 65, that:

"As pointed out in this discussion, the involved provider agreements have fixed termination dates. Social Security regulations under subchapter XIX of the Social Security Act (the act upon which plaintiffs bottom their

> action) specifically establish those time limits. Any contract, which specifically provides a term to run, with a fixed termination date, voluntarily entered into by the parties, cannot be said to create a property right in any party thereto that will result in its renewal or extension, and such a refusal does not constitute a denial of due process of law. Such rule would be applicable here if indeed the 'provider agreement' is simply and only a contract.
>
> "* * *
>
> "* * *The necessary holding, therefore, according to conclusions in this decision, ante, is that the lapsed provider agreements terminated by the included provisions do not require a hearing, there being no property interest involved demanding such an exercise of 'due process.'"

Plaintiff contends that this case can be distinguished from Shady Acres. It is true that Shady Acres was determined after a full evidentiary hearing on the merits in the trial court; whereas, this action was dismissed for failure of plaintiff's complaint to state a claim for relief. It is also possible that the evidence that might be adduced upon a trial herein would vary significantly from the evidence adduced in Shady Acres. However, in this case, like Shady Acres, the basic issue is whether plaintiff is entitled to a due process evidentiary hearing before the Ohio Department of Public Welfare can refuse to renew the provider agreement upon termination of a prior agreement for alleged noncompliance with the applicable federal standards, known as the Life Safety Code.

By the first assignment of error, plaintiff contends that the failure to provide such a prior evidentiary hearing constitutes a denial of due process under the Fourteenth Amendment to the United States Constitution.

There is no contention herein that plaintiff, by the action of the Department of Public Welfare, can no longer operate as a licensed nursing home in Ohio. Nor is there any contention that plaintiff can no longer receive, care for, and be paid for patients receiving public assistance. Rather, the effect of the refusal to renew the provider agreement is that plaintiff no longer will be paid by the Ohio Department of Welfare for providing "skilled nursing care" to recipients of certain types of aid from said department.

The basic problem arises from a difference in standards as to what constitutes "skilled nursing care" between the federal statutes and regulations and the Ohio statutes and regulations. Under Ohio law, R. C. 3721.01(A), "A nursing home is licensed to provide personal assistance as required and skilled nursing care." Apparently, the federal statutes and regulations divide what is termed and defined as "skilled nursing care" by the Ohio statutes and regulations into two classes: skilled nursing care and intermediate nursing care. If the Ohio statutes and regulations and the federal statutes and regulations were identical as to definitions and licensing, obviously, no problem of hearing would exist because a home licensed under Ohio law necessarily would have been found to have met the Ohio standards, which then would be identical to the federal standards, and R. C. 3721.07(G) specifically provides for an appeal from a denial of an Ohio license. However, it appears that plaintiff remains licensed under Ohio law as a nursing home entitled to render "skilled nursing care," as defined under Ohio law, but has been found not to meet the standards to render skilled nursing care as defined by federal law and, therefore, is not entitled to a renewal of its provider agreement with the Ohio Department of Welfare, as provided for under federal law.

Under Ohio law, there is, at most, merely casual reference to the provider agreement in R.C. 5101.51, with the primary controlling provisions being under federal law, causing this court, in Shady Acres, to observe (page 66):

> "45 C.F.R. 249.10(B)(4)(i) tends to indicate that the 'agreement' to some extent partakes the nature of a license to operate as a 'skilled nursing home' under the federal act and regulations. However, assuming that the 'agreement' is actually a federal license, R. C. Chapter 119 does not apply because the 'license' is not a state license but a federal license with the state agency acting as an agent of the federal government in issuing the 'license.' The right to a hearing, as well as the conditions upon which the 'license' will be issued, is necessarily controlled, not by state law, but by the federal law and regulations."

In Board of Regents of State Colleges v. Roth (1972), 408 U.S. 564, 92 S. Ct. 2701, the United States Supreme Court held that the action of a state in refusing to renew a contract (in that case a teacher's contract), does not require a prior hearing. The court stated, at page 569-571:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

> "* * *Undeniably, the respondent's re-employment prospects were of major concern to him--concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. * * *"

The Supreme Court did go on to state, at page 573, that:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. * * *"

The Supreme Court went on to discuss what constitutes a protected property interest, at page 577:

> "* * *To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.* * *"

Conversely, on the same day as the decision in Roth, the United States Supreme Court decided Perry v. Sindermann (1972), 408 U.S. 593, 92 S. Ct. 2694, in which a nontenured teacher was determined to have a right to an evidentiary hearing in connection with the state's determination not to renew his teaching contract. Upon the pertinent issue, the Supreme Court decision states, at page 599-601:

> "But the respondent's allegations--which we must construe most favorably to the respondent at this stage of the litigation--do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a de facto tenure program, and that he had tenure under that program. * * * Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure. Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a 'property' interest in continued

BLEED THROUGH

> employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him."

However, the Supreme Court decision concluded with the statement that (page 603):

> "* * *Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

Plaintiff's complaint reveals that such an opportunity has been offered to it by the defendants. Attached to and made a part of the complaint is the letter of September 12, 1974, from the director of the Ohio Department of Public Welfare, notifying plaintiff of the nonrenewal of the provider agreement, and reads as follows:

> "This letter will serve written notice to you by registered mail, that, pursuant to relevant sections of 45 CFR 234, the Ohio Department of Public Welfare is choosing not to renew your eligibility for vendor payments made to the 32 bed Skilled Nursing section under Title XIX of the Social Security Act, effective October 12, 1974.
>
> "This action is being taken for the following reasons:
>
> "On June 30, 1973, the Provider Agreement between the above stated facility and the Ohio Department of Public Welfare was terminated. The initial

> surveys for recertification were made by the survey agency, Ohio Department of Health, on 7/11/73 and 7/12/73. The last date on the Plan of Correction was entered as 4/1/74. Resurveys were made on 6/1, 6/19 and 7/25/74, at which time only 7 out of 15 deficiencies had been corrected. The survey agency found the facility to still be in non-compliance with the Life Safety Code. Therefore, on the basis of the preceding information, the Ohio Department of Public Welfare will not enter into a new Provider Agreement with your facility as a provider of skilled nursing services.
>
> "You have a right to a state hearing on this action if you request it within thirty days of the mailing date of this letter. Your rights to this due process hearing does not require that the Ohio Department of Public Welfare continue payments to you during the pendency of your request for a state hearing. Among the rights provided, you have the right to be represented or to represent yourself personally, and the right to have a state hearing if you request the same within thirty days of the mailing of this letter.
>
> "However, we wish to make it clear that you do not have a right to a due process hearing prior to the action which we are proposing. Thus, even if you request a state hearing within thirty days of the mailing of this letter, the Ohio Department of Public Welfare will proceed to terminate your eligibility for vendor payments, effective October 12, 1974."

Such letter offered to plaintiff a full due process hearing upon the question of renewal of the provider agreement if requested by plaintiff. Whether or not plaintiff has taken advantage of this opportunity does not appear from the record. However, plaintiff had a full opportunity to be heard as to the cause of nonrenewal upon request. The fact that payments under the prior provider agreement would not be continued during the

BLEED THROUGH

pendency of such determination does not constitute a denial of due process under the allegations herein, so long as such hearing is speedily and diligently conducted and determined. The affording of such hearing, which may be requested although not determined prior to the effective date of nonrenewal, would appear to be consistent with Sindermann. Finding no denial of due process in the procedure followed by defendants, the first assignment of error is not well taken.

By the second assignment of error, plaintiff contends that it has a right of appeal, pursuant to R.C. Chapter 119. This assignment of error is not well taken for the reasons stated in Shady Acres, supra. Furthermore, the complaint clearly reveals that, even if such appeal were available, plaintiff has not yet exhausted the administrative remedies available to it.

Plaintiff does contend that Shady Acres can be distinguished in that the full import of the definition of agency set forth in R.C. 119.01(B) was not reviewed by this court therein. However, we find no reason to reach a different result than that reached in Shady Acres. There is no statute making the functions of the Department of Welfare subject to R. C. Chapter 119, nor does the provider agreement constitute a license within the meaning of R. C. 119.01. Accordingly, the second assignment of error is not well taken.

The last three assignments of error are interrelated, although they refer to different state agencies. With respect to each of these agencies, the Department of Health, the Department of Industrial Relations, Division of Factory and Building, and the State Fire Marshal, adjudications under applicable law are subject to the Administrative Procedure Act, R. C. Chapter 119.

There is no allegation herein that there were adjudication orders made by any of these three state agencies as to matters within their purview under applicable state law. Had such adjudication orders been made, plaintiff would have had a right to an administrative hearing and an administrative appeal. The three state

agencies apparently made investigations not as to plaintiff's compliance with applicable state law, but as to plaintiff's compliance with the Life Safety Code under the federal law and regulations. The agencies apparently submitted reports as to their findings to the Department of Welfare. Such investigations and reports do not constitute adjudications by those agencies under the applicable state law. Plaintiff has, if it availed itself of it, an opportunity for a hearing upon the question of the correctness of the finding of these agencies, such hearing to be conducted by the Department of Welfare in accordance with the September 12, 1974, letter quoted above. It is not necessary that the three other state agencies conduct hearings in connection with their investigation and reports to the Department of Welfare because no orders to enforce such findings will emanate from the three other state agencies. Although the complaint refers to investigations by three state agencies, the September 12, 1974, letter refers only to the Department of Health as a "survey agency." There is no indication herein that the defendants relied upon actions of any of the other three agencies in enforcing state law within their respective purview or in issuing orders or making adjudications with regard thereto. Accordingly, the third, fourth, and fifth assignments of error are not well taken.

For the foregoing reasons, all five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

REILLY, J., concurs.

McCORMAC, J., dissents.

No. 74AP-585

McCORMAC, J., Dissenting.

Appellant operates a nursing home which was receiving patients from the Ohio Department of Public Welfare, who through a provider agreement with the federal government, was paying a stipulated daily rate for providing skilled nursing care to welfare recipients accomodated therein.

Title XIX of the Social Security Act provides for certain standards for payment by the federal government through a state agency for welfare recipients in a skilled nursing home. Those standards are different from standards established by the state of Ohio. Under the federal law, an agency of the state, in this instance the Ohio Department of Public Welfare, is designated as the agency responsible for seeing that these standards are fulfilled so that the payment is made only to nursing homes which meet the applicable federal standards. In this particular case several other agencies of state government, to-wit, the Department of Health, Department of Industrial Relations, and State Fire Marshal, reported to the Ohio Department of Public Welfare that appellant's nursing home did not comply with applicable federal standards. As a result of those reports, and without prior hearing, appellant was notified that its nursing home would not be recertified to receive additional federal payments under the provider agreement.

Appellant filed a complaint for an injunction and declaratory judgment against appellees to prevent them from refusing to renew the provider agreement, based on the alleged noncompliance with federal standards without according appellant a prior evidentiary hearing. The action was dismissed for failure of plaintiff's complaint to state a claim upon which relief can be granted. In order to sustain the dismissal, it must appear beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Conley v. Gibson (1957), 355 U. S. 41.

Appellant is entitled to the most favorable inferences from its complaint. Those inferences are, among others, that there is a de facto, if not legal, right to continued certification as a skilled nursing home under Title XIX of the Social Security Act unless there can be shown to be noncompliance with federal standards. Appellant alleges in its complaint that it has complied with federal standards and that termination of the agreement will deprive it of needed revenue to its irreparable damage. At this point there has been no opportunity to prove the amount of economic harm that will be done to appellant if it is not certified under the provider agreement, and there has been no opportunity to present proof as to the manner in which nursing homes are recertified under the provider act or the expectation a nursing home has of recertification if they continue to comply with federal standards. It seems possible, if not highly probable, that recertification under the provider agreement is automatic unless state agencies designated to investigate certain aspects of compliance report to the Department of Public Welfare that the nursing home fails to comply with federal standards. As noted in the majority decision, there is no prior opportunity to challenge the reports of the Department of Health, Department of Industrial Relations, or the State Fire Marshal since appellant's state license has not been affected. Yet these reports provide the very basis for refusal to recertify a nursing home for continued payments under the provider agreement. In summary then, appellant may be able to prove under the allegations of its complaint that it has complied with federal standards applicable to a skilled nursing home under the Life Safety Code, and that state agencies have misconstrued these standards, resulting in refusal to recertify it as a skilled nursing home and in failure to receive payments to which it would otherwise be entitled. It may also be able to prove that this recertification has caused substantial economic detriment to it. Further proof may be that, as a practical or legal matter, recertification is automatic unless there is an alleged violation of federal standards.

The issue then is whether the complaint possibly indicates loss of a valuable property right, as described by the United States Supreme Court, to which there are due process rights of prior hearing guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution.

Two cases cited in the majority decision indicate to me that appellant may be able to prove that its interest in recertification is a protected property interest to which a prior right of hearing is required. The first case is that of Board of Regents v. Roth (1972), 408 U. S. 564. Here the court held that, to have a property interest in a benefit, person must have more than an abstract need or desire for it; he must instead have a legitimate claim of entitlement to it. Appellant may be able to present evidence that the state policy implemented by appellee Ohio Department of Public Welfare is that recertification automatically results unless reports are received indicating noncompliance with the federal law. It is highly improbable that the evidence will be otherwise, as certainly the state cannot discriminate between complying nursing homes. This evidence would indicate a legitimate claim of entitlement to recertification in the event of compliance with federal law rather than an abstract need or desire. In Perry v. Sindermann (1972), 408 U.S. 543, the United States Supreme Court held that a nontenured teacher had a right to an evidentiary hearing prior to termination of his contract where there was an allegation that the college had a de facto tenure program. The facts in this case indicate that there may be a de facto program of continued certification in the event of compliance with federal standards. Perry also supports appellant's contention that its action should not have been dismissed for failure to state a complaint.

The one remaining stumbling block standing in the way of reversal seems to be the holding in Shady Acres Nursing Home, Inc., v. Canary (1973), 39 Ohio App. 2d 47. That decision would be applicable if the evidence fails to show that appellant has a protected property interest. The mere fact that it is a provider agreement which

has certin termination dates does not in and of itself decide that question and should not be interpreted as such. The nontenured teaching contract in Perry also has a stated termination date but, even so, if there is a de facto program of continuation, a prior evidentiary hearing is required under the Fifth and Fourteenth Amendments of the United States Constitution.

Consequently, the case should be remanded to the trial court with instructions to determine whether appellant can present proof of a property interest to which it has a legitimate claim of entitlement and, if so, to grant appellant a hearing where it can be informed of the grounds for the state's failure to certify and have an opportunity to challenge its sufficiency prior to loss of certification.

For the reasons expressed in this dissenting opinion, the judgment of the trial court should be reversed, assignment of error number one should be sustained, and the case remanded for further action consistent with this decision.

APPENDIX E

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Convalescent Care, Inc., :

Plaintiff-Appellant, :

v. : No. 74AP-585

Charles W. Bates, Director, Ohio Department of Public Welfare, et al., :

Defendants-Appellees. :

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
1975 March 30 pm 4:02
THOMAS J. ENRIGHT
CLERK OF COURTS

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on May 15, 1975, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

s/ Alba Whiteside

s Archer E. Reilly

JUDGES

cc: Richard F. Swope
James Carpenter
James Unger

APPENDIX F

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 19 75 TERM

City of Columbus. To wit: September 18, 1975

Convalescent Care, Inc., Appellant, vs. Charles W. Bates, Dir., Ohio Department of Public Welfare, et al., Appellees.

No. 75-640

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Franklin County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by _____

Richard F. Swope

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this _____ day of _____ 19____

_____Clerk

_____Deputy

APPENDIX G

AMENDMENT (V)

(RIGHTS OF PERSONS)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

AMENDMENT (XIV)
(RIGHTS OF CITIZENS)

§ 1 [1] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall [2]make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [3]deprive any person of life, liberty, or property, without due process of law; nor [4]deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

AMENDMENT (X)

(RESERVED STATE POWERS)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

BLEED THROUGH

APPENDIX J

§ 119.01 Definitions.

As used in sections 119.01 to 119.13 of the Revised Code:

(A) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses. Sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission, nor do they apply to actions of the superintendent of banks, the superintendent of building and loan associations, and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, building and loan associations, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies, nor to any action that may be taken by the superintendent of banks under sections 1125.10, 1113.02, and 1113.05 of the Revised Code, or by the superintendent of building and loan associations under section 1155.18 of the Revised Code. Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the industrial commission under sections 4123.01 to 4123.94 of the Revised Code. Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the bureau of employment services except those relating to the adoption, amendment, or rescission of rules, and those relating to the issuance,

suspension, revocation, or cancellation of licenses.

(B) "License" means any license, permit, certificate, commission, or charter issued by the agency.

APPENDIX K

§ 119.06 Adjudication order of agency valid and effective; hearings, periodic registration of licenses. (GC § 154-67)

No adjudication order of an agency shall be valid unless said agency is specifically authorized by law to make such order.

No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing.

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency or to another agency and also give the appellant a right to a hearing on such appeal.

Such sections do not require a stenographic record at a hearing except where the record of the hearing may be the basis of an appeal to court.

BLEED THROUGH

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license.

When periodic registration of licenses is required by law the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

§ 119.07 Notice of hearing; contents notice of order of suspension of license; publication of notice; effect of failure to give notice (GC § 154-68)

Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing him of his right to a hearing. Such notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for such proposed action, the law or rule directly involved, and a statement informing the party that he is entitled to a hearing if he requests it within thirty days of the time of mailing the notice. The notice shall also inform the party that at the hearing he may appear in person, by his attorney, or by such other representative as is permitted to practice before the agency, or may present his position, arguments, or contentions in writing and that at the hearing he may present evidence and examine witnesses appearing for and against him. A copy of such notice shall be mailed to attorneys or other representatives of record representing the party. This paragraph does not apply to situations in which such section provides for a hearing only when it is requested by the party.

When a statute specifically permits the suspension of a license without a prior hearing, notice of the agency's order shall be sent to the party by registered mail, return receipt requested, not later than the business day next succeeding such agency's action, cite the law or rule directly involved, and state that the party will be afforded a hearing if he requests it within thirty days of the time of mailing the notice. A copy of such notice shall be mailed to attorneys or other representatives of record representing the party.

Whenever a party requests a hearing in accordance with this section and section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for such hearing

BLEED THROUGH

and forthwith notify the party thereof. The date set for such hearing shall be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party.

When any notice required by sections 119.01 to 119.13, inclusive, of the Revised Code, to be sent by registered mail, is returned because of inability to deliver, the notice required shall be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known place of residence or business of the party is located. A copy of the newspaper, with the first publication of said notice marked, shall be mailed to the party at such address and the notice shall be deemed received as of the date of the last publication.

The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, in the manner provided in this section shall invalidate any order entered pursuant to such hearing.

§ 119.12 Appeal by party adversely affected.

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license, registration of a licensee, or revoking or suspending a license, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in Ohio, he may appeal to the court of common pleas of Franklin county.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal, issued under section 3737.20 of the Revised Code, may be to the court of common pleas of the county in which the building of the aggrieved person is located.

This section does not apply to appeals from the department of taxation.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. In

BLEED THROUGH

the event an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal. Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the liquor control commission suspending or revoking a permit issued under Chapter 4303. of the Revised Code shall terminate not more than fifteen months after the date of the filing of notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated within that time.

Within twenty days after receipt of notice of appeal from an order in any case wherein a hearing is required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed shall, upon motion, cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed ten days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense thereof shall be taxed as a part of the costs on the appeal. The appellant must provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency.

Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference to all proceedings under sections 119.01 to 119.13, inclusive, of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency and shall proceed as in the case of appeals in civil actions as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules and regulations of the agency and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record. Such appeals may be taken regardless of the fact that a proceeding was pending prior to

the amendment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice of appeal within the time prescribed by section 2505.07 of the Revised Code.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

APPENDIX N

§ 3721.07 Conditions for issuance of license.

Every person, firm, partnership, association, or corporation desiring to operate a home as defined in section 3721.01 of the Revised Code shall apply for such a license to the director of health. The director shall issue a license for the home, if after investigation of the applicant and inspection of the home, the following requirements or conditions are satisfied or complied with;(:)

(A) The applicant has not been convicted of a felony or a crime involving moral turpitude;

(B) The applicant is not violating any of the regulations made by the public health council or any order issued by the director of health;

(C) The buildings in which the home is housed have been approved by the department of industrial relations, and the state fire marshal or a township, municipal, or other legally constituted fire department approved by the marshal. In the approval of a home such agencies shall apply standards prescribed by the board of building standards , and by the state fire marshal, and by section 3721.071 (3721.07.1) of the Revised Code.(;)

(D) The applicant, if it be an individual, or the principal participants, if it be an association or a corporation, is or are suitable financially and morally to operate a home defined in section 3721.01 of the Revised Code;

(E) The applicant is equipped to furnish humane, kind, and adequate treatment and care;

(F) The home does not maintain or contain:

(1) Facilities for the performance of major surgical procedures;

(2) Facilities for providing therapeutic radiation;

(3) An emergency ward;

(4) A clinical laboratory unless it is under the supervision of a clinical pathologist who is a licensed physician in this state;

(5) Facilities for radiological examinations are performed only by a person licensed

BLEED THROUGH

to practice medicine, surgery or dentistry in this state.

(G) The home does not accept or treat out-patients, except upon the written orders of a physician licensed in this state, maternity cases, boarding children, and does not house transient guests housed for twenty-four hours or less or accept, treat or house persons suffering from active pulmonary tuberculosis.

When the director issues a license, the license shall remain in effect until revoked by the director or voided at the request of the applicant; provided, there shall be an annual renewal fee payable during the month of January of each calendar year .

Any applicant who is denied a license may appeal in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code.

APPENDIX O

§ 5101.51 Medical assistance program for recipients of aid; contracts for services.

The department of public welfare may provide medical assistance under Title XIX (19) of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, to recipients and potential recipients of aid under Chapter 5107. of the Revised Code and to recipients of federal aid under Title XVI of such Act who would have been eligible for aid under the standards of assistance in effect on January 1, 1972 for aid for the aged, aid to the blind, and aid for the permanently and totally disabled programs under former Chapters 5105., 5106., and 5151. of the Revised Code and to other aged, blind, and disabled persons whose expenditures for medical care reduce their income below such standards, as long as federal funds are provided for such assistance. The county department of welfare of each county shall establish the eligibility for medical assistance of recipients of aid under Title XVI living in the county, and shall notify the department of public welfare in the manner prescribed by the department. The county shall be reimbursed for administrative expenditures in accordance with the provisions of sections 5101.16 and 5101.161 (5101.16.1) of the Revised Code. Expenditures for medical assistance shall be made from funds appropriated to the department of public welfare for public assistance subsidies. Any such program shall conform to the requirements of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.

The department may contract with any person, firm, corporation, or association for the examination of all or any types of medical assistance claims.

Such contracting party shall provide the following services as may be required by the department:

BLEED THROUGH

(A) Make determinations of the amount of payments to be made upon claims for medical assistance;

(B) Prepare and furnish to the department lists of such claims for payment;

(C) Make audits of the claims of providers of medical assistance according to procedures approved by the department;

(D) Assistant providers of medical assistance in the development of procedures relating to utilization practices, make studies of the effectiveness of such procedures and methods for their improvement, and assist in the application of safeguards against unnecessary utilization;

(E) Assist any institution, facility, or agency to qualify as a provider of medical assistance and to establish and maintain fiscal records for such medical assistance program;

(F) Perform statistical and research studies;

(G) Perform such other duties as are necessary to carry out the medical assistance program.

In entering into any such contract, the department shall determine that the contracting party is qualified to perform the required services and shall follow applicable procedures required of the department of administrative services in sections 125.07 to 125.11 of the Revised Code.

§ 249.33 Standards for payment for skilled nursing facility and intermediate care facility services.

(a) State plan requirements. A State plan for medical assistance under title XIX of the Social Security Act must:

(1) Provide that the single State agency will, prior to execution of an agreement with any facility (including hospitals) for provision of skilled nursing facility services and making payments under the plan obtain certification from:

(i) The agency designated pursuant to § 250.100(c) of this chapter that the facility meets the statutory definition contained in section 1861 (j) of the Social Security Act and is in full compliance with the standards prescribed by the Secretary in the regulations promulgated thereunder, except that for purposes of § 405.1134(c) of Title 20, the agency may waive, or, for purposes of § 405.1134(e) of Title 20, the agency may permit, variations in the provisions therein for facilities participating only under title XIX, provided such waiver or variation is authorized under conditions promulgated by the Secretary; or

(ii) The Secretary, pursuant to section 1910 of the Act, that the facility has been determined to qualify as a skilled nursing facility under title XVIII of the Act; or

(iii) The Secretary, pursuant to section 1905 of the Act, in the case of a facility located in the State on an Indian reservation that it meets the statutory definition contained in section 1861(j) of the Social Security Act and is in full compliance with the standards prescribed by the Secretary in the regulations promulgated thereunder.

(2) Provide that the single State agency will, prior to execution of an agreement with any facility (including hospitals and skilled nursing facilities) for provision of intermediate care facility services and making payments under the plan, obtain certification from the agency designated pursuant to § 250.100(c) of this chapter that the facility meets the definition set forth under § 249.10(b)(15); except that in the case of an intermediate care facility determined

to have deficiencies under the requirements for environment and sanitation (§ 249.12(a)(6)) or of the Life Safety Code (§ 249.12(a)(5)) it may be recognized for certification as an intermediate care facility in accordance with subparagraph (4) (iii) of this paragraph for a period not exceeding 2 years following the date of such determination provided that:

(i) The institution submits a written plan of correction acceptable to the survey agency which contains:

(A) The specific steps that it will take to meet all such requirements; and

(B) A timetable not exceeding 2 years from the date of the initial certification after publication of these regulations detailing the corrective steps to be taken and when correction of deficiencies will be accomplished;

(ii) The survey agency makes a finding that the facility potentially can meet such requirements through the corrective steps and they can be completed during the 2 year allowable period of time;

(iii) During the period allowed for corrections, the institution is in compliance with existing State fire safety and sanitation codes and regulations;

(iv) The institution is surveyed by qualified personnel at least semiannually until corrections are completed and the survey agency finds on the basis of such surveys that the institution has in fact made substantial effort and progress in its plan of correction as evidenced by supporting documentation, signed contracts and/or work orders, and a written justification of such findings is maintained on file; and

(v) At the completion of the period allowed for corrections, the intermediate care facility is in full compliance with the Life Safety Code (NFPA, 21st Edition 1967), and the requirements for environment and sanitation set forth under § 249.12(a)(6), except for any provisions waived in accordance with § 249.12.

(3) Provide that any intermediate care facility receiving payments under the plan must supply to the licensing agency of the State full and complete information, and promptly report any changes which would affect the current accuracy of such information, as to the identity:

i) Of each person having (directly or indirectly) an ownership interest of 10 percent or more in such facility, or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by such intermediate care facility or any of the property or assets of such facility,

(ii) In case a facility is organized as a corporation, of each officer and director of the corporation, and

(iii) In case a facility is organized as a partnership, of each partner;

(4) Provide that certification by the survey agency designated pursuant to § 250.100(c) of this chapter will be subject to the following provisions and exclusions:

(i) For purposes of paragraph (a)(1)(i) of this section, the facility is in compliance with each condition of participation as determined by the manner and degree to which the facility satisfies the standards within each condition:

(ii) For purposes of paragraphs (a)(1)(i) and (a)(2) of this section, the facility is in full compliance with the standards or meets the following conditions for any standards not fully met:

(A) The deficiencies noted, individually or in combination neither jeopardize the health and safety of patients nor are of such character as to seriously limit the provider's capacity to render adequate care. A written justification of such findings is maintained on file by the survey agency; and

(B) The facility provides in writing a plan of correction acceptable to the survey agency;

(iii) In the case of facilities certified under the provisions of paragraph (a)(4)(ii)(A) and (B) of this section certification will be for:

(A) A period that is no later than the 60th day following the end of the time period specified for the correction of deficiencies in a written plan which the survey agency has approved provided that such period shall not exceed 12 full calendar months or

BLEED THROUGH

(B) A conditional term of 12 full months, subject to an automatic cancellation clause that the certification will expire at the close of a predetermined date which is no later that the 60th day following the end of the time period specified for the correction of deficiencies; Provided, That such date will occur within such 12-month period, unless the survey agency finds that all required corrections have been satisfactorily completed, or unless the survey agency finds and notifies the State agency that the facility has made substantial progress in correcting such deficiencies and has resubmitted in writing a new plan of correction acceptable to the survey agency. Except as provided in paragraph (a)(6) of this section, the period of a certification shall not exceed 12 calendar months.

(iv) No second certification under the condition specified in paragraph (a)(4)(ii) of this section may be executed if:

(A) The standard found deficient was in compliance during the previous certification period, except where the survey agency has made a determination based upon documented evidence that the facility despite intensive efforts or for reasons beyond its control was unable to maintain compliance and despite the deficiency(ies) the facility is making the best use of its resources to render adequate care; or

(B) The standards found deficient are the same as those which occasioned the prior certification, except:

(1) In a case where a facility can document to the State survey agency's satisfaction that it achieved compliance with a previously unmet standard during the period of certification but for reasons beyond its control and despite, in the judgment of the survey agency, a good faith effort to maintain compliance with the standard, was again out of compliance by the time of the next survey; or

(2) In the case of a skilled nursing facility completing the second of two successive agreements under provisions for certification in effect prior to July 1, 1973 and having the same deficiency (ies) which occasioned the two agreements, the survey agency will review the performance of such facility (which may be

limited to a review of the documentation of record) in providing safe and adequate patient care and in progressing toward correction of such deficiency(ies). On the basis of its evaluation, the survey agency will advise the single State agency that:

(i) No provider agreement may be executed with such facility

(ii) A new provider agreement may be executed for a period related to the time required to correct such deficiencies, but not to exceed six months; or

(iii) A new provider agreement may be executed for a period of twelve months but subject to a provision for automatic cancellation 60 days following the scheduled date for correction unless the survey agency finds and notifies the State agency that all required corrections have been satisfactorily completed. If the facility continues to be out of compliance with the same standard(s) at the end of the term of the agreement, a recertification may not be made.

(v) For purposes of this subparagraph (4), waivers granted pursuant to section 1902(a)(28) of the Act of § 249.12 are not considered deficiencies.

(5) Provide that the survey agency designated pursuant to § 250.100(c) of this chapter will:

(i) Review information contained in medical review and independent professional review team inspections made pursuant to State plan provisions under section 1902(a)(26) and (31) of the Social Security Act;

(ii) Review statements obtained from each facility setting forth (from payroll records) the average numbers and types of personnel (in full-time equivalents) on each shift during at least 1 week of each quarter, such week to be selected by the survey agency and to occur irregularly in each quarter of the year;

(iii) Review and evaluate such reports as they reflect on health and safety requirements and as necessary take appropriate action to achieve compliance or withdraw certification; and

(iv) Perform, with qualified personnel, on-site inspections at least once during the

term of a certification or more frequently if there is a question of compliance.

(6) Provide that execution of the single State agency provider agreement with a facility for payments under the plan shall be contingent upon certification in accordance with the provisions of paragraph (a)(1) and (2) of this section. The term of an agreement may not exceed a period of one year and the effective date of such agreement may not be earlier than the date of certification. Execution of a provider agreement shall be for the term and in accordance with the provisions of certification determined by the survey agency except that the single State agency for good cause based on adequate and documented evidence may elect to execute a provider agreement for a term less than the full period of certification or may elect not to execute a provider agreement or may cancel a provider agreement for participation by a facility certified under the State plan. Notwithstanding the provisions of this subparagraph the single State agency may extend such term for a period not exceeding two months where the survey agency has notified the single State agency in writing prior to the expiration of a provider agreement that the health and safety of the patients will not be jeopardized thereby, and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program.

(7) Provide that in the case of a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions, the single State agency will, prior to the execution of an agreement for the provision of intermediate care facility services, obtain a written agreement from the State or political subdivision responsible for the operation of such public institution that the non-Federal expenditures in any calendar quarter prior to January 1, 1975, with respect to

(i) Services furnished to residents in such institutions (or distinct part thereof) and

(ii) services for individuals released during the preceding four quarters as provided in § 249.10 (c)(3), will not, because of payments made under the plan, be reduced below the average quarterly per capita amount expended for services to residents in such institution in the four quarters immediately preceding the quarter in which the State in which such institution is located elected to make such services available under its approved plan;

(8) Provide during the period ending three years after the effective date of section 249.13 that in the case of an institution (or distinct part thereof) for the mentally retarded or persons with related conditions, the single State agency will:

(i) Prior to the execution of a provider agreement covering intermediate care facility services, where the institution is not in compliance with the standards specified in § 249.13, obtain a written plan of compliance which shall be submitted (including any amendments thereto) by the institution to the single State agency and approved by the Secretary, for achieving conformity with the standards specified in § 249.13. The plan of compliance shall:

(A) Detail the extent of the institution's current compliance with the standards prescribed in § 249.13, and the specific action steps required to achieve compliance with the standards specified in such section, including:

(1) The number, job titles, and qualifications of personnel currently employed by the facility and arrangements for recruiting and training additionally required personnel sufficient to assure that each resident participates in an effective program of active treatment;

(2) Any necessary structural changes and renovations to buildings and a schedule for their completion;

(3) The programs and services currently provided and any required reorganization or expansion thereof.

(B) Establish a timetable not exceeding 3 years from the effective date of § 249.12 for completion of all action steps necessary to achieve conformity with the standards specified in § 249.13;

BLEED THROUGH

(C) In the case of a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions, provide for approval of the plan of compliance by the State or political subdivision having jurisdiction over the operation of such public institution;

(D) Provide for semi-annual reports to be submitted to the single State agency by the institution documenting the actions taken and recording the progress made in implementing the plan of compliance;

(ii) Prior to the execution of a second (and each and any succeeding) provider agreement, obtain a written report from the survey agency (based on an on-site inspection) establishing that the facility is adhering to the timetable for completion of all necessary action steps referred to in paragraph (a)(8)(i) of this section.

(9) Provide that in the case of skilled nursing facilities certified under the provisions of title XVIII of the Social Security Act, the term of a provider agreement shall be subject to the same terms and conditions and coterminous with the period of approval of eligibility specified by the Secretary pursuant to that title, and upon notification that an agreement with a facility under title XVIII of the Act has been terminated or cancelled, the single State agency will take appropriate action to terminate the facility's participation under the plan. A facility whose agreement has been cancelled or otherwise terminated may not be issued another agreement until the reasons which cause the cancellation or termination have been removed and reasonable assurance provided the survey agency that they will not recur.

(10) Provide that facilities which do not qualify under this section are not recognized as skilled nursing facilities or intermediate care facilities for purposes of payment under title XIX of the Act.

(b) Federal financial participation. (1) Federal financial participation is available at 75 percentum in expenditures of the single State agency for compensation (or training) of its skilled professional medical personnel and staff directly supporting such personnel, which are necessary to carry out these regulations.

(2) Federal financial participation at applicable rates is also available for the single State agency to enter into a written contract (under the supervision of the Medical Assistance Unit) with the survey agency designated pursuant to § 250.100(c) of this chapter as necessary to carry out its responsibilities under these regulations. Such Federal financial participation is available only for those expenditures of the survey agency which are not attributable to the overall cost of meeting responsibilities under State law and regulations for establishing and maintaining standards but which are necessary and proper for carrying out these regulations.

(39 FR 2254, Jan. 17, 1974; 39 FR 8918, Mar. 7, 1974, and amended at 39 FR 16972, May 10, 1974)

APPENDIX Q

§ 405.604 Term agreements with skilled nursing facilities.

Effective with respect to provider agreements accepted for filing on or after October 30, 1972, an agreement with a skilled nursing facility shall be for a specified term and such term shall be determined by the Secretary in the following manner:

(a)(1) The term of an agreement may be for a period of 12 full calendar months where the facility is in full compliance with the standards contained in Subpart K of this part.

(2) Where the facility is not in full compliance with standards contained in Subpart K of this part the term of an agreement may:

(i) Be restricted to a term that ends no later than the 60th day following the end of the time period specified for the correction of deficiencies in a written plan which the Secretary has approved: Provided, That such term shall not exceed 12 full calendar months; or

(ii) Provide a conditional term of 12 full months, subject to an automatic cancellation clause that the agreement will terminate at the close of a predetermined date which shall be no later than the 60th day following the end of the time period specified for the correction of deficiencies; Provided, That such date will occur within such 12-month term, unless the Secretary determines that all required corrections have been satisfactorily completed or that the facility has made substantial effort and progress in correcting such deficiencies and has resubmitted in writing a plan of correction acceptable to the Secretary.

(b)(1) Where the Secretary determines that the health and safety of program beneficiaries will not be jeopardized thereby, the term of an agreement may be extended for a period of 2 full calendar months, if the Secretary finds that such extension is necessary to:

(i) Prevent irreparable harm to such facility; or

(ii) Prevent hardship to the program beneficiaries being furnished items and services by such facility; or

(2) If the Secretary finds it impracticable within such term to determine whether such facility is complying with the provisions of the Act and regulations issued thereunder.

(c)(1) Except as provided in paragraph (b) of this section, the term of an agreement may not be extended and such agreement shall terminate at the close of the last day of its specified term and will not be automatically renewable from term to term.

(2) The nonrenewal of an agreement under the conditions described in this section is not a termination of the agreement by the Secretary pursuant to the provisions discussed in § 405.614. A determination by the Secretary not to accept such facility for participation following the end of such term shall be an initial determination relating to the facility's qualifications as a provider of services for the period immediately following such term and the facility shall be entitled to a hearing with respect to such determination. (See Subpart O of this part.)

(3) Where the Secretary determines that he will not accept an agreement with a skilled nursing facility for the period immediately following the end of the term of such facility's existing agreement, the Secretary shall give notice of such determination to the facility at least 30 days and to the public at least 15 days before the end of such term. Each notice by the Secretary shall state the reasons for such determination, the effective date for the termination of the existing agreement, and the applicability of such termination as it relates to the services of the facility.

(d) Notwithstanding the preceding provisions of this section, an agreement filed by an extended care facility (now defined as a skilled nursing facility) which was accepted by the Secretary prior to October 30, 1972, and which was in effect on such date, shall be for a specified term ending at the close of December 31, 1973.

APPENDIX R

§ 405.1120 Condition of participation -- compliance with Federal, State, and local laws.

The skilled nursing facility is in compliance with applicable Federal, State, and local laws and regulations.

(a) Standard: Licensure. The facility, in any State in which State or applicable local law provides for licensing of facilities of this nature:

(1) Is licensed pursuant to such law; or

(2) If not subject to licensure, is approved by the agency of the State or locality responsible for licensing skilled nursing facilities as meeting fully the standards established for such licensing, and

(3) Except that a facility which formerly met fully such licensure requirements, but is currently determined not to meet fully all such requirements, may be recognized for a period specified by the State standard-setting authority.

(b) Standard: Licensure or registration of personnel. Staff of the facility are licensed or registered in accordance with applicable laws.

(c) Standard: Conformity with other Federal, State, and local laws. The facility is in conformity with all Federal, State, and local laws relating to fire and safety, sanitation, communicable and reportable diseases, postmortem procedures, and other relevant health and safety requirements.

APPENDIX S

§ 405.1902 Certification by State agency.

(a) Section 1864(a) of the Social Security Act provides that the services of State agencies, operating under agreements with the Secretary, will be used by the Secretary in determining whether providers or prospective providers meet the conditions of participation or suppliers meet the conditions for coverage. Pursuant to these agreements, State agencies will survey each provider and supplier and certify to the Secretary as to whether they are found to be in compliance with the conditions of participation and/or coverage.

(b) In the case of a skilled nursing facility completing the second of two successive agreements under title XIX provisions in effect prior to July 1, 1973, and having the same deficiency(ies) which occasioned the two agreements, the State survey agency will review the performance of such facility (which may be limited to a review of the documentation of record) in providing safe and adequate patient care and in progressing toward correction of such deficiency(ies). On the basis of its evaluation, the State survey agency will recommend to the Secretary that:

(1) No provider agreement may be executed with such facility; or

(2) A new provider agreement may be executed for a period related to the time required to correct such deficiency(ies) but not to exceed 6 months; or

(3) A new provider agreement may be executed for a period of 12 months but subject to a provision for automatic cancellation 60 days following the scheduled date for correction unless the State survey agency finds and notifies the Secretary that all required corrections have been satisfactorily completed.

(c) The certifications by the State agency represent recommendations to the Secretary. The Secretary, on the basis of such certifications by the State agency will determine whether a provider or supplier is eligible to participate in the

Health Insurance for the Aged and Disabled Program. Notice of determination of eligibility or noneligibility will be sent to the provider or supplier.

§ 405.1903 Documentation of findings.

(a) The findings of the State agency with respect to each of the conditions of participation or conditions for coverage shall be adequately documented. Where the State agency certifies to the Secretary that a provider or supplier is not in compliance with the conditions, and therefore not eligible to participate in the program, such documentation includes, in addition to the description of the specific deficiencies which resulted in the agency's recommendation, a report of all consultation which has been undertaken in an effort to assist the provider or supplier to comply with the conditions, a report of the provider's or supplier's responses with respect to the consultation, and the State agency's assessment of the prospects for such improvements as to enable the provider or supplier to achieve compliance with the conditions within a reasonable period of time. (See § 405.1907.)

(b) If a provider or supplier is certified by the State agency as in compliance with the conditions or as meeting the requirements for special certification (see § 405.1910), with deficiencies not adversely affecting the health and safety of patients, the following information will be incorporated into the finding:

(1) A statement of the deficiencies which were found, and

(2) A description of further action which is required to remove the deficiencies, and

(3) A time-phased plan of correction developed by the provider and supplier and concurred with by the State agency, and

(4) A scheduled time for a resurvey of the institution or agency to be conducted by the State agency within 90 days following the completion of the survey.

(c) If, on the basis of the State certification, the Secretary determines that the provider or supplier is eligible to participate, the information described in paragraph (b) of

this section will be incorporated into a notice of eligibility to the provider or supplier.

§ 405.1904 Periodic certification of compliance and approval.

(a) Initial certifications and recertifications by the State agency to the effect that a provider or supplier is in compliance with all the conditions of participation will be for a period of 12 months. (See paragraph (b) of this section for periods of certification applicable to skilled nursing facilities.) State agencies may visit or resurvey providers or suppliers more frequently where necessary to evaluate correction of deficiencies, ascertain continued compliance, or accommodate to periodic or cyclical survey programs. In addition, the State agency shall review information received through medical review conducted in skilled nursing facilities (see § 405.1121(d)). The State agency shall also review statements obtained from each facility setting forth (from payment records) the average numbers and types of personnel (in full-time equivalents) on each tour of duty during at least 1 week of each quarter, such week to be selected by the survey agency and to occur irregularly in each quarter of the year. The State agency shall evaluate such reports as may pertain to the health and safety requirements, and, as necessary, take appropriate action to achieve compliance or certify to the Secretary that compliance has not been achieved. A State finding and certification to the Secretary that a provider or supplier is no longer in compliance will supersede the State's previous certification.

(b) A certification of a skilled nursing facility shall be for a period of up to 12 months, subject to the provision that any agreement filed by a skilled nursing facility with the Secretary under section 1866 of the Social Security Act and accepted by him prior to October 30, 1972, shall be deemed to be for a specified period ending December 31, 1973. A certification for

BLEED THROUGH

less than 12 months may be issued in appropriate situations, based on such factors as the nature of deficiencies which may exist and the degree of progress achieved in correcting prior deficiencies. An agreement with a skilled nursing facility may, at the option of the Secretary, also be subject to automatic cancellation based upon a failure to correct deficiencies. (See § 405.604.) (See § 405.1908 where a standard is not met during the period of a certification.)

§ 405.1905 Certification of noncompliance.

(a) The State agency will certify that a provider or supplier is not or is no longer in compliance with the conditions of participation or conditions for coverage where the deficiencies are of such character as to substantially limit the provider's or supplier's capacity to render adequate care or which adversely affect the health and safety of patients; or

(b) If it is determined by the Secretary that an institution or agency is not in compliance with the conditions of participation or conditions for coverage, or that an institution or agency is no longer in compliance and the participation agreement is terminated under the conditions described in § 405.614, the institution or agency has the right to request that the determination be reviewed.

In The

SUPREME COURT OF THE UNITED STATES

No. 75-1291

CONVALESCENT CARE, INC.,
Petitioner,

vs.

CHARLES W. BATES, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC WELFARE, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
ARGUMENT	
I. Can the respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract (provider agreement) to care for welfare recipients without affording petitioner a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the 5th and 14th Amendments to the Constitution of the United States?	4
II. Does the enforcement by respondent of federal standards which are substantially more stringent than existing state standards against petitioner result in the federal government's invasion of powers reserved to the states, in contravention of the 10th Amendment to the Constitution of the United States?	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Board of Regents v. *Roth*,
408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701
(1972) 6, 7, 8, 9, 10

Goldstein v. *California*,
412 U.S. 546, 37 L. Ed. 2d 163, 93 S. Ct. 2303
(1972) 9

Jeffries v. *Turkey Run Consol. School Dist.*,
492 F. 2d 1 (7th Cir., 1974) 8

Orr v. Trinter,
444 F. 2d 128 (6th Cir., 1971) 7

Paramount Convalescent Center, Inc. v. *Department of Health Care Services*, 542 P. 2d 1, 125 Cal. Rptr. 265 (1975) 4, 6, 8, 9, 10

Patrone v. *Howland Schools Board of Education*,
472 F. 2d 159 (6th Cir., 1972) 7

Perry v. *Sindermann*,
408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694
(1972) 7, 8

Shady Acres Nursing Home, Inc. v. *Canary*,
316 N.E. 2d 481, 39 Ohio App. 2d 47
(1973) 3, 5-6, 8, 9, 10

Page

Constitutional Provisions:

Constitution of the United States, Fifth Amendment 4

Constitution of the United States, Tenth Amendment 9, 11

Constitution of the United States, Fourteenth Amendment 4

Statutes:

42 U.S.C. Section 1396 2

Section 5101.51, Ohio Revised Code 3

Other Authorities:

45 C.F.R. Section 249.33 2

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

In the opinion of the respondents the following questions are presented for review:

I. Can the respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract (provider agreement) to care for welfare recipients without affording petitioner a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the 5th and 14th Amendments to the Constitution of the United States?

II. Does the enforcement by respondent of federal standards which are substantially more stringent than existing state standards against petitioner result

in the federal government's invasion of powers reserved to the states, in contravention of the 10th Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Under Title XIX, Social Security Act (42 U.S.C. § 1396, *et seq.*), states are required as a condition of federal financial participation in Medicaid, to enter into provider agreements with qualified nursing homes by which the individual homes agree to provide services to Medicaid recipients and the state agrees to make payments for such services directly to the home. To determine whether the provider meets federal standards the state agency must obtain a statement of compliance from the state health department. This statement is called "certification." 45 C.F.R. § 249.33.

Without such certification the Ohio Department of Public Welfare may not enter into a provider agreement. Even with such certification, however, the welfare department may choose not to enter into a provider agreement for reasons not a part of the certification process, such as inadequate services of medical personnel or past fraud in obtaining payment. Three classes of Medicaid nursing home provider agreements exist: skilled care, intermediate care, and rest home care. Requirements for certification vary between the three levels of care. For example, the National Life Safety Code must be satisfied for skilled care facilities but not for intermediate care facilities. 45 C.F.R. § 249.33 (a) (1) (vii).

The petitioner owns and operates a skilled nursing home in Canton, Ohio, licensed by the Ohio Department of Health pursuant to 45 C.F.R. § 249.33 as a skilled nursing

home indicating compliance with federal requirements which would authorize the home to contract to care for certain welfare patients. The home then contracted, pursuant to Section 5101.51, Ohio Revised Code, with the Ohio Department of Public Welfare to provide skilled nursing care to welfare recipients for a specified rate and for a specified period of time.

The respondent was under a preliminary injunction in *Shady Acres Nursing Home, Inc.* v. *Canary*, 316 N.E. 2d 481, 39 Ohio App. 2d 47 (1973), to terminate no providers until resolution of a variety of issues. Petitioner's provider agreement with the Ohio Department of Public Welfare expired during the pendency of that injunction, on June 30, 1973, but payments were continued pursuant to the injunction. After the expiration of petitioner's provider agreement the Ohio Department of Health took steps to recertify the home, but such recertification was never made because of petitioner's failure to correct deficiencies and to comply with the Life Safety Code. On September 12, 1974, petitioner was advised by leter from the respondent Ohio Department of Public Welfare that because of his failure to satisfy the Life Safety Code the Ohio Department of Health had failed to certify his compliance with federal regulations, and thus respondent could not enter into a new provider agreement and would terminate Medicaid payments on October 12, 1974.

Prior to the termination of payments petitioner filed the instant action in the Common Pleas Court of Franklin County, Ohio where his motion for a preliminary injunction was denied and his complaint was subsequently dismissed. From that dismissal the petitioner appealed to the Franklin County, Ohio, Court of Appeals which court overruled petitioner's assignments of error and affirmed the de-

cision of the trial court. The Supreme Court of Ohio overruled petitioner's motion to certify without opinion.

The petitioner was notified by the letter of September 12, 1974, that he could request a hearing on the refusal of the Ohio Department of Public Welfare to renew his provider agreement, but that he had no right to an evidentiary hearing prior to termination of payments because his provider agreement was not being revoked but had, indeed, expired. The respondent has asserted, and prevailed on such assertion in the state courts, that the petitioner was denied no due process rights by the decision of the respondent not to renew his provider agreement. Since the state courts have decided the questions of law in this case in accord with applicable decisions of this Court, the respondents submit that the petition for writ of certiorari should be denied.

ARGUMENT

I. Can the respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract (provider agreement) to care for welfare recipients without affording petitioner a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the 5th and 14th Amendments to the Constitution of the United States?

It is settled law that upon the expiration of a contract (which a provider agreement is), no due process rights attach and thus no hearing is required prior to a refusal to renew such contract. In *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services*, 542 P. 2d 1,

125 Cal. Rptr. 265 (1975), the California Supreme Court clearly decided that due process did not require the California Department of Health Care Services to grant a hearing to a nursing home prior to a determination by the department not to renew a contract with the facility for the care of welfare patients. In that decision the Court stated:

> "We conclude that Paramount's interest in the renewal of the provider contract amounted only to a hope or a unilateral expectation of renewal rather than to a legal entitlement. But we do not intend to imply by this holding that the department may arbitrarily refuse to enter into a contract with a nursing home which meets the requirements of federal and state law. Rather, the effect of the provisions described above is to place upon a facility, as a condition of the renewal of its contract, the burden of demonstrating annually that it complies with the appropriate standards. If the department determines not to renew a contract because of an alleged failure to conform to those requirements a nursing home may challenge the propriety of the refusal by the very means which Paramount employed in the present proceeding, i.e., by seeking a writ of mandate alleging compliance with the regulations, and an order to compel the department to enter into a contract. We do not perceive any constitutional impediment to imposing such a requirement upon a profit-making institution which desires to participate in a government-funded program." 542 F. 2d at 6-7; 125 Cal. Rptr. at 270-271.

Similarly the Franklin County, Ohio, Court of Appeals decided in the case of *Shady Acres Nursing Home, Inc.* v. *Canary, supra,* that no hearing need be held upon expiration of a nursing home provider agreement. There in a class action brought by skilled nursing homes, the Court held, *inter alia*:

> "As pointed out, even the appellee agrees that the renewal of a provider agreement, or recertification, cannot be accomplished unless there is a compliance with federal statutes and regulations. The necessary holding, therefore, according to conclusions in this decision, *ante*, is that the lapsed provider agreements terminated by the included provisions do not require a hearing, there being no property interest involved demanding such an exercise of 'due process.'" 316 N.E. 2d at 492; 39 Ohio App. 2d at 65.

In addition, the California Supreme Court in *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra,* addressed one of the main contentions of the petitioner herein, i.e. that the effect of respondent's action on petitioner's business creates the right to a due process hearing as a condition of nonrenewal of petitioner's contract. The Court stated:

> "We recognize that the refusal of the department to renew a provider agreement may seriously affect a nursing home's business. Nevertheless, this factor alone cannot be deemed decisive. For any vendor of goods or services to the state may be equally damaged if it has become dependent upon government purchases for a substantial portion of its income and the state chooses not to renew a purchasing contract. Yet no one would suggest that the vendor's dependence upon government purchases alone results in a legal entitlement to a new contract or that the vendor is entitled to a due process hearing as a condition of nonrenewal." 542 P. 2d. at 8; 125 Cal. Rptr. at 272.

The rationale in *Paramount* and *Shady Acres* follows the case of *Board of Regents* v. *Roth,* 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), in which the United States Supreme Court held that a non-tenured faculty member does not have a liberty or a property interest in his con-

tinued employment upon a refusal to renew his contract. This principle was earlier accepted by the United States Sixth Circuit Court of Appeals in *Orr* v. *Trinter,* 444 F. 2d 128 (6th Cir., 1971). The analogy between *Board of Regents* v. *Roth, supra,* and the instant case is readily apparent. Both cases involve fixed term contracts between state agencies and individuals. Further, both cases involve the nonrenewal of such contracts. Indeed, the basis for the *Roth* decision is that any property interest which exists by way of an individual contracting with the state terminates upon the expiration of that agreement. That is precisely the position of respondent in this case.

The concept of tenure figured importantly in *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann,* 408 U.S. 593, 33 L. Ed 2d 570, 92 S. Ct. 2694, (1972). In the *Perry* case the Court held that formal tenure need not be present to create a property right. Of course, actual tenure for a teacher creates a continuing contractual situation. *Perry* held that a de facto tenure system may exist, and that an "expectancy" of employment can result in a property right which cannot be affected without affording due process of law. But this "expectancy" of continuing employment has been viewed restrictively. For example, in the case of *Patrone* v. *Howland Schools Board of Education,* 472 F. 2d 159 (6th Cir., 1972), a teacher had eight successive one year teaching contracts and the local board decided not to renew his contract. They gave no statement of reasons for the nonrenewal and gave no hearing. The Sixth Circuit Court of Appeals decided that in spite of eight successive one year contracts there was no expectancy of continued employment shown. Upon expiration of a state employment contract not only do all procedural due process requirements (*i.e.* a hearing prior to termination) cease, but the individual involved cannot assert substantive due

process rights as to the nonrenewal. Unless another constitutional right is affected by the nonrenewal, it may be accomplished even for arbitrary reasons. *Jeffries* v. *Turkey Run Consol. School Dist.*, 492 F. 2d 1 (7th Cir., 1974).

The petitioner has cited in his Petition for a Writ of Certiorari (pp. 20-24) several recent decisions of the United States Supreme Court in the area of due process which he contends are controlling as to the question of whether he has a right that is protected by the due process clause of the federal constitution. He contends that those cases establish such a right. The respondent asserts, however, that only *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann, supra,* which were discussed previously in this brief, are applicable to the instant case and that the other eight Supreme Court cases cited by petitioner can be distinguished on the basis that they did not involve the failure to renew a contract upon its expiration. Their reasoning is therefore not persuasive in the present context. We submit that the *Roth* and *Perry* decisions, particularly Roth, are more nearly on point with the instant situation since they were concerned with any possible due process rights arising out of a contractual agreement upon its expiration. We further submit that the *Roth* decision, together with *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra,* and *Shady Acres Nursing Home, Inc.* v. *Canary, supra,* supports the decisions of the state courts that petitioner had no due process right which was violated by a decision by respondent Ohio Department of Public Welfare not to renew petitioner's provider agreement. This Court should deny the petition for writ of certiorari.

II. Does the enforcement by respondent of federal standards which are substantially more stringent than existing state standards against petitioner result in the federal government's invasion of powers reserved to the states, in contravention of the 10th Amendment to the Constitution of the United States?

Petitioner's Tenth Amendment argument is premised upon the assumption that his due process argument is correct, *i.e.* that respondent has denied petitioner the procedural safeguards to which he is entitled. However, respondent contends that it has provided petitioner with all procedural rights to which he is entitled under the present state of the law. See *Board of Regents* v. *Roth, supra; Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra;* and *Shady Acres Nursing Home, Inc.* v. *Canary, supra.* The state courts have agreed with respondent's contention.

The petitioner has cited in support of his Tenth Amendment argument the case of *Goldstein* v. *California*, 412 U.S. 546, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973). This case, while quoting some comments of Alexander Hamilton from the Federalist papers, is a copyright case and is in no way factually related to the instant case. Petitioner has taken one paragraph out of context from the *Goldstein* case and has used it as the sole authority for his argument that respondent has violated the Tenth Amendment to the Constitution of the United States. Respondent submits that petitioner's Tenth Amendment argument hardly constitutes a substantial constitutional question. Therefore this Court should deny the petition for writ of certiorari.

CONCLUSION

The respondent submits that this case does not present significant constitutional issues. We further submit that the state courts have decided the issues in this case in accord with applicable decisions of this Court.

The respondent has no power to revoke petitioner's license to operate a nursing home in the State of Ohio and accept those patients which he chooses. Respondent only has the power to refuse to enter into a provider agreement with petitioner, thereby denying to him payments on behalf of Medicaid patients which he might accept. The chance that such refusal might harm Medicaid patients by denying them care would be minimal, because Medicaid patients in such a home would merely be transferred to one of the many nursing homes with which the respondent has a provider agreement in effect. In fact the Medicaid patients would be benefitted because they would then be in a home for which the respondent has received a certification that fire, health and safety standards had been met.

As to the constitutional due process issue alleged by petitioner, that issue was decided by the California Supreme Court in *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra,* and substantially the same issue was decided by the United States Supreme Court in *Board of Regents* v. *Roth, supra.* Although petitioner states that all of the due process cases of the United States Supreme Court relied on by him were decided after *Shady Acres,* actually only three of the nine Supreme Court cases cited by him were decided after *Shady Acres* and none of the cases which he cited were decided after *Paramount.* The respondent submits that petitioner's cases are distinguishable and do not displace *Paramount, Shady Acres* and *Roth* as the controlling decisions in this area. Thus

the constitutional due process issue has been previously addressed by the courts and does not constitute a substantial constitutional question.

Finally the respondent submits that petitioner's constitutional argument concerning Tenth Amendment violations is frivolous. Petitioner cites no authority for this proposition and no cases in which even similar issues were considered. Respondent submits that this issue most certainly does not constitute a substantial constitutional question. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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